

CONCORDIA UNIVERSITY

JK421.051928

C001 V

INTRODUCTION TO AMERICAN GOVERNMENT



3 4211 000046324

WITHDRAWN

11704



Digitized by the Internet Archive
in 2025

https://archive.org/details/bwb_C0-AYF-858

INTRODUCTION TO AMERICAN GOVERNMENT

THE CENTURY
POLITICAL SCIENCE SERIES

EDITED BY FREDERIC A. OGG, *University of Wisconsin*

VOLUMES PUBLISHED

Frederic A. Ogg and P. Orman Ray, *INTRODUCTION TO AMERICAN GOVERNMENT* (3d ed.); Walter F. Dodd, *STATE GOVERNMENT IN THE UNITED STATES* (new edition preparing); John M. Mathews, *AMERICAN FOREIGN RELATIONS: CONDUCT AND POLICIES*; Herbert Adams Gibbons, *INTRODUCTION TO WORLD POLITICS*; Pitman B. Potter, *INTRODUCTION TO THE STUDY OF INTERNATIONAL ORGANIZATION* (3d ed.); Graham H. Stuart, *LATIN AMERICA AND THE UNITED STATES* (2d ed.); Charles G. Fenwick, *INTERNATIONAL LAW*; Raymond G. Gettell, *HISTORY OF POLITICAL THOUGHT, and HISTORY OF AMERICAN POLITICAL THOUGHT*; Thomas H. Reed, *MUNICIPAL GOVERNMENT IN THE UNITED STATES*; Lent D. Upson, *THE PRACTICE OF MUNICIPAL ADMINISTRATION*; Edward M. Sait, *AMERICAN PARTIES AND ELECTIONS*.

VOLUMES IN PREPARATION

Andrew C. McLaughlin, *CONSTITUTIONAL HISTORY OF THE UNITED STATES*; Edward S. Corwin, *CONSTITUTIONAL LAW OF THE UNITED STATES*; Francis W. Coker, *RECENT AND CONTEMPORARY POLITICAL THEORY*; William Y. Elliott, *PRINCIPLES OF POLITICAL SCIENCE*; William S. Carpenter, *COMPARATIVE GOVERNMENT*; Joseph P. Chamberlain, *THE THEORY AND PRACTICE OF LEGISLATION*; John A. Fairlie and C. M. Kneier, *COUNTY GOVERNMENT AND ADMINISTRATION*; Thomas H. Reed, *EUROPEAN MUNICIPAL GOVERNMENT*; Charles Seymour, *EUROPEAN DIPLOMACY SINCE 1914*; Edwin M. Borchart, *HISTORY OF AMERICAN DIPLOMACY*; J. R. Hayden, *COLONIAL GOVERNMENT AND ADMINISTRATION*; Stanley K. Hornbeck, *AMERICAN INTERESTS AND POLICIES IN THE FAR EAST*; Harold S. Quigley, *GOVERNMENTS AND PARTIES IN THE FAR EAST*; Frank M. Russell, *THEORIES OF INTERNATIONAL RELATIONS*.

OTHER VOLUMES TO BE ARRANGED

INTRODUCTION TO AMERICAN GOVERNMENT

BY

FREDERIC A. OGG, PH.D., LL.D.

PROFESSOR OF POLITICAL SCIENCE IN
THE UNIVERSITY OF WISCONSIN

AND

P. ORMAN RAY, PH.D.

PROFESSOR OF POLITICAL SCIENCE IN
THE UNIVERSITY OF CALIFORNIA

Third Edition Thoroughly Revised



STUDENTS LIBRARY
CONCORDIA TEACHERS COLLEGE
RIVER FOREST, ILLINOIS

NEW YORK
THE CENTURY CO.

353

034i

copy 2

Copyright, 1922, 1925 and 1928, by

THE CENTURY Co.

258



Printed in U. S. A.

16022

PREFACE TO THE FIRST EDITION

This book is intended to supply, within reasonable compass, an account of the national, state, and local governments of the United States. The needs of the serious-minded general reader have not been ignored. But the person for whom the volume is primarily designed is the college student who finds himself enrolled in a general course in American government and politics in perhaps his sophomore year. It is with him in mind that three features, in particular, have been incorporated. The first is the innovation comprised in Part I. The college student is sufficiently mature to be brought into profitable contact with the more important elements, principles, and problems of political science in general—matters which relatively few ever study in separate courses. Experience shows that such contact stretches the mind and widens the horizon, to the student's great advantage when he comes to contemplate the American, or any other particular, governmental system. Definitions are established, concepts are worked out, background and perspective are gained, which result in both a saving of time and an enrichment of knowledge and interpretation. Nevertheless, the contents of this volume are so arranged that, at the instructor's discretion, Part I can be omitted altogether, or used only for occasional reference.

The second feature that has been deliberately stressed is criticism of existing political institutions and practices. If defects and failures seem sometimes to have been dwelt upon unduly, it has been only with a view to developing in the student an inquiring, discriminating, critical attitude, and directing his thought along forward-looking and constructive lines. A third feature, closely related, is the attempt to emphasize principles, rather than structural and procedural details. The student of American government must become master of a large body of facts. But he ought not to stop there. Facts readily slip from the mind. Besides, they are subject to ceaseless change. Principles, points of view, tendencies, influences and counter-influences, the reaction of human nature to political tasks and situations—these are the things with which

instruction in government must mainly deal if it is to be dynamic and socially useful.

Without pretending to supply exhaustive bibliographies, we have sought to guide both teachers and students to the best and most available books, magazine articles, and documents on the various topics taken up.

FREDERIC A. OGG
P. ORMAN RAY

April 4, 1922.

PREFATORY NOTE TO THE SECOND EDITION

With a view to bringing its contents fully up to date and otherwise increasing its serviceableness as an aid to intelligent and fruitful instruction on the political institutions and life of our country, this book has been revised throughout. It may be of convenience to readers to indicate here that the principal changes are (1) some condensation of Part I, dealing with the elements of political science, and of the chapters of a purely historical character; (2) bracketing of a considerably amplified chapter dealing with the people as voters with the chapter relating to national parties and elections; (3) removal of the chapter on the national judiciary to a position enabling the student to become familiar with the Supreme Court before studying the powers of Congress, with which that tribunal has had so much to do; (4) expansion of the treatment of the national administrative system; (5) addition of a new chapter on the growth of national activities; and (6) fuller treatment of the nature and protection of private rights, civil service problems, congressional leadership and output, regulation of immigration, workings of the national budget system, results of the direct primary, non-voting, judicial reform, the quality of state legislatures, newer developments in municipal government, and a variety of other topics.

For criticisms and advice received from numerous persons who have had experience with the book in the class-room we are duly grateful.

F. A. O.
P. O. R.

April 4, 1925.

PREFATORY NOTE TO THE THIRD EDITION

Without materially altering the scope or arrangement of the book, we have sought in the present edition to bring the treatment up to date, not alone as to factual matter but also in the emphasis placed upon changing interests, new experience, and current tendencies. Part I, outlining the elements of political science for purposes of orientation and background, has been retained, at the request of many teachers, but has been somewhat further condensed and can readily be omitted, or used only for occasional reference, if desired. Bibliographical apparatus, in foot-notes and chapter lists, is considerably more ample than in preceding editions. This, of course, increases the bulk of the volume. But it is believed that time will be saved for both teachers and students and the habit of wide and varied reading stimulated. Special mention should be made of the fact that it has not seemed necessary to insert references systematically to the several well-known volumes of "readings", e.g., those of Pollock, Crawford, Mott, Johnson, Mathews and Berdahl, Reed and Webbink, Reinsch, Wright, and Maxey. It is assumed that users of the book will not need to be guided to these convenient aids—beyond the general recommendation here made.

We have continued to profit by the friendly criticism of persons who have had experience with the book in the class-room.

F. A. O.
P. O. R.

April 4, 1928.

CONTENTS

PART I

PRINCIPLES AND PROBLEMS OF GOVERNMENT

CHAPTER		PAGE
I	INTRODUCTION: THE STUDY OF GOVERN- MENT	3
II	NATURE AND FUNCTIONS OF THE STATE .	9
III	CONSTITUTIONS AND GOVERNMENTS . . .	24
IV	THE DISTRIBUTION OF PUBLIC POWERS .	39
V	THE STRUCTURE OF GOVERNMENTS . . .	48
VI	PRIVATE RIGHTS	61

PART II

THE FOUNDATIONS OF GOVERNMENT IN THE UNITED STATES

1. *Historical Background*

VII	COLONIAL BEGINNINGS	67
VIII	THE FIRST STATE AND NATIONAL GOVERN- MENTS	83
IX	THE MAKING OF THE CONSTITUTION . .	104

2. *The Constitutional System*

X	THE NATION AND ITS POWERS	119
XI	THE STATES	136
XII	CITIZENSHIP AND PRIVATE RIGHTS . . .	156
XIII	CONSTITUTIONAL DEVELOPMENT . . .	179

PART III

THE NATIONAL GOVERNMENT

1. *Structure, Functions, and Workings*

CHAPTER		PAGE
XIV	THE PRESIDENCY	197
XV	NOMINATION AND ELECTION OF THE PRES- IDENT	208
XVI	THE PRESIDENT AS CHIEF EXECUTIVE . .	234
XVII	THE PRESIDENT AND CONGRESS	258
XVIII	EXECUTIVE AND ADMINISTRATIVE ORGANI- ZATION	279
XIX	THE OLDER DEPARTMENTS AND THEIR WORK	303
XX	THE NEWER DEPARTMENTS—PROBLEMS OF ADMINISTRATIVE REORGANIZATION . .	328
XXI	THE STRUCTURE OF CONGRESS	347
XXII	THE ORGANIZATION OF HOUSE AND SENATE	371
XXIII	CONGRESS AT WORK	396
XXIV	THE NATIONAL JUDICIARY	425
XXV	THE POWERS OF CONGRESS: GENERAL VIEW	456 ✓
XXVI	NATIONAL REVENUES	474
XXVII	NATIONAL EXPENDITURES, DEBTS, BANK- ING, AND CURRENCY	495
XXVIII	COMMERCE AND OTHER BUSINESS . . .	522
XXIX	THE EXPANSION OF NATIONAL ACTIVITIES .	557
XXX	TERRITORIES, DEPENDENCIES, AND PROTEC- TORATES	571

2. *Instrumentalities of Popular Control*

XXXI	THE PEOPLE AS VOTERS	597
XXXII	POLITICAL PARTIES AND NATIONAL ELEC- TIONS	615

PART IV

STATE GOVERNMENT

XXXIII	IMPORTANCE AND COMMON FEATURES OF THE STATES	644
--------	---	-----

CONTENTS

xi

CHAPTER		PAGE
XXXIV	STATE CONSTITUTIONS	655
XXXV	THE LEGISLATURE: STRUCTURE AND COM- POSITION	673
XXXVI	THE LEGISLATURE: POWERS AND LIMITA- TIONS	692
XXXVII	THE LEGISLATURE AT WORK	712
XXXVIII	THE STATE EXECUTIVE	735
XXXIX	STATE ADMINISTRATION	752
XL	STATE FINANCE	775
XLI	THE STATE JUDICIARY	804
XLII	THE PARTY SYSTEM IN THE STATES	830

PART V

LOCAL GOVERNMENT AND ADMINISTRATION

XLIII	THE COUNTY AND ITS GOVERNMENT	862
XLIV	CRITICISM AND RECONSTRUCTION OF COUNTY GOVERNMENT	881
XLV	THE CITY AND ITS CHARTER	897
XLVI	THE MAYOR-COUNCIL TYPE OF CITY GOV- ERNMENT	911
XLVII	COMMISSION AND MANAGER GOVERNMENT	922
XLVIII	PROTECTIVE ACTIVITIES OF THE CITY	938
XLIX	OTHER MUNICIPAL ACTIVITIES—CITY FI- NANCE	951
L	TOWNSHIPS, VILLAGES, AND SPECIAL DIS- TRICTS	966
	APPENDIX: THE CONSTITUTION OF THE UNITED STATES	979
	INDEX	999

INTRODUCTION TO
AMERICAN GOVERNMENT

INTRODUCTION TO AMERICAN GOVERNMENT

PART I

PRINCIPLES AND PROBLEMS OF GOVERNMENT

CHAPTER I

INTRODUCTION: THE STUDY OF GOVERNMENT

This volume is designed for use in introductory courses in political science in American colleges and universities. The authors, therefore, feel safe in assuming that most persons who take it up will already have an elementary knowledge of many matters with which it deals. Such readers will have learned in some degree from their study of American history and civics, or from observation, how our national constitution was framed and adopted, upon what principles it is based, what we mean by the doctrine of separation of powers, how the president is elected, how the houses of Congress are composed and what are some of the things that they can do, what the courts are for, how a bill is passed in a state legislature, who collects the state taxes, what the duties of the sheriff are, what commission government is, how the public schools are supported, how a jury is made up, what the coroner has to do and why he rarely does it well. All of these interesting things one may know, however, in a general way without having gained that intimate acquaintance with the structural characteristics, the successes and failures, and the practical problems of our government which present-day conditions demand of intelligent and responsible citizens. We come now, therefore, to a broader and a more detailed study, with more background, more comparison, more attempt at interpretation. There will be no lack of new facts to learn; the oldest, most experienced, and most observing statesmen in Washington find something new, and perhaps something puzzling, in our governmental system every year, and almost every day. But we are not interested in merely amass-

The purpose of this book

ing facts as isolated bits of information. It is, rather, principles, objectives, methods, problems, points of view, that will repay the effort to be expended.

This leads us to say that we shall begin at a point which, at first glance, appears far afield. Indeed, for a time we shall seem to be rather cavalierly ignoring our subject altogether. The reason is that the sort of study of American government which we intend to make can be pursued most effectively only in the light of certain background ideas and view-points which the student who takes up this book for the first time can hardly be expected to have acquired. To be more specific, we must prepare for an analysis of our American system of government by looking somewhat closely into the nature of government in general, and of the state as an institution shaped by human experience in widely separated lands and ages. How did men come to be grouped and organized in states? What are a state's necessary features or attributes? What is the difference between a state and a nation? How did government arise? What are the various kinds of states and of governments? What do we mean by the term "sovereignty," which looms large on almost every page of our national history? What are the objects of government? What is law, and what are its sources? When and how was the principle of representation introduced? What is the difference between a constitution and a statute?

It does not have to be argued that if we can get some clear notions on these matters, and others of the kind, we shall be able to view our American plan of government with a perspective and a grasp that will add much to the profitableness of our study.

Having laid this foundation, we shall be prepared to consider in some detail the origins of our American political ideas, usages, and organizations; to trace, in the large, the development of our constitutional system from 1789 to the present day; to see the relations of our different jurisdictions or areas of government; to analyze, one by one, the several governments—national, state, and local—under which we live; to describe the organization, methods, and problems of those dynamic subsidiaries of government which we call political parties; and to take note of recent and proposed changes through which our political system reveals its living, growing, and fundamentally healthy character. Whenever specially instructive, comparisons will be drawn between American and English, French, Swiss, and other foreign political forms and practices.

Why study government at all? There are at least three good reasons. The first is that the building up and carrying on of governmental systems is one of the most universal and absorbing of human activities. Aristotle said that man is a political animal; and certainly no one can go far toward understanding human history and achievement without taking account of political organization and life. As an historical and social phenomenon, government would be decidedly interesting, even if it did not touch us personally at all. But the second reason for studying government is that all of us live under governmental organization of some kind, and that the conditions of our existence are largely determined by the form which this organization takes. Government envelops us as does the air we breathe. It is government that constructs our highways, builds our schoolhouses, lays our sidewalks, guards us against contagious diseases, protects us when we travel abroad, delivers our letters, hears and adjusts our complaints against our neighbors, safeguards our lives and property. When a man votes, pays his taxes, buys a box of cigars, marries, is divorced, goes into bankruptcy, ships a consignment of goods, inherits an estate, brings a law-suit, has a deed recorded, purchases a postage stamp, deposits money in a bank, or indeed receives or pays out money in any form, he is dealing—though he may not stop to think about it—with government, or acting under regulations that government has laid down. That the citizen should be well informed upon the history, organization, functions, and workings of the government which holds the power of life and death over him hardly requires argument.

But there is a third and stronger reason for the study of government. In the United States and most other parts of the world today it is the people who govern. It is for the citizen himself to say, directly or through his representatives, what laws shall be made and who shall make them, what taxes shall be levied, how the revenues shall be spent, how large an army shall be maintained, what regulations shall be imposed upon commerce and business, whether officers shall be subject to popular recall, what powers the state governor and the state legislature shall have, whether the foreign-born shall be allowed to vote before they are naturalized, what shall be the nation's policy toward Mexico. Government is, in most countries, what the people make it. If it is wasteful, corrupt, arbitrary, the masses can no longer lay the blame on a king, or on his ministers, or on a ruling aristocracy.

CHAP.
IReasons for
studying
governmentResponsi-
bility of
the people
for the
character
of their
government

They are themselves the rulers. They do not ordinarily, it is true, make laws, administer, and judge directly. But they frame, or assent to, the constitutions under which governments are organized, and they choose the law-makers and many of the administrators and judges. The fundamental object of the study of government is, therefore, not mental training, nor yet the mere acquisition of interesting and valuable information, but the promotion of intelligent and responsible citizenship.

Relation of
"government" (or
political
science)
to other
social
studies:

1. Sociology

2. Economics

Books and courses of study pertaining to government are commonly listed under the general head of "political science," which may be conveniently defined as the organized body of knowledge pertaining to the state; and it will be well before going farther to take brief account of the relation which this subject of study bears to some others in the so-called "social science" group. The fundamental social science is sociology, which analyzes and describes in a systematic way the life of men in groups or aggregates. Thus conceived, sociology embraces the larger part of history, almost all of political science and political economy, the whole of law, and much of religion. Obviously, such a subject is too vast to be studied effectively by any one person, and hence scholars have come to recognize certain boundaries which, although necessarily flexible, give sociology, for working purposes, a more restricted scope and preserve for the more specialized social sciences a recognized field and position. It thus comes about that the sociologist yields to the political scientist the observation and interpretation of such of the social relationships of men as are of a distinctly political character. The sociologist delves into the organization of primitive society, studies the clan and the tribe and the race, traces the development of customs and manners, views the rise of labor systems, watches the growth of religions, measures the advance of general culture, seeks out the laws of population; but he gives attention only incidentally to the forms and conduct of government. The political scientist, on the other hand, largely restricts his studies to political thought, organization, and action, such as are found mainly among those divisions of mankind that have reached a relatively high level of civilization.

Another social study to which political science bears close relation is political economy, or economics. From the days of Aristotle to the eighteenth century, political economy was, indeed, conceived of as a part of the science of the state. The subject, as understood nowadays, deals with the individual and social

activities of man in the production, consumption, and distribution of goods and services. In so far as these activities are subject to government regulation, the field of economics still overlaps that of political science. And since the range of such regulation is, in most countries, being rapidly extended, the two fields grow less separable, rather than more so. One has only to think of taxation, regulation of commerce, labor legislation, workingmen's insurance, banking, currency, and the control of immigration to be impressed with the extent to which the economist and political scientist must nowadays work together.

Political science is also closely related to history. An English historian of the last generation was fond of saying that "history is past politics and politics present history." Taken literally, the statement is not true; history is a great deal more than politics, and a considerable portion of politics (or political science)—especially on the speculative side—is not history. None the less, history acquaints us with the experience of men in all lands and ages; and in so far as that experience is political, or has political effects, the record of it becomes an indispensable basis of political science. In turn, political science, by bringing together the data of history, interpreting the past in a philosophic spirit, and determining the legal and governmental conditions that make for human welfare, furnishes history one of its main reasons for being. "History without political science," says another English scholar, "has no fruit; political science without history has no root."¹

At first thought, one might suppose that political science has no relation to natural science; and most writers have treated it as if this were the case. But a little reflection will show that one, at least, of the natural sciences, *i.e.* biology, has fundamental political contacts and implications. After all, it is men who make governments and run them; and it is for men that governments exist. But men are, fundamentally, biological beings, with animal attributes and propensities. And no one can quite understand the phenomena of political life who does not take into account the biological sub-stratum of all human nature and activity. Similarly, there are connections between political science and psychology. How men act in the field of political endeavor is determined no less by their mental processes than are their attitudes on education, religion, business, sport, and social intercourse. Par-

CHAP.
I

3. History

Other contributing studies

¹ J. Seeley, *Introduction to Political Science*, 4.

ticularly important, as is now being recognized in increasing degree, is the psychology of party leadership, legislative manipulation, electoral campaigns, and that elusive, but inescapable, thing which we call public opinion. For no one of the social studies is psychology—not alone the so-called “social psychology,” but the psychology of the individual man and woman—more significant than for the study of politics, particularly in its more dynamic phases. In a very real sense, political science is “a critical analysis of the behavior of men in their civic relationships.”¹ Darwin and Wundt and William James must be conceded some share in the making of the science of politics, along with Aristotle and Rousseau and John Stuart Mill.

REFERENCES

- J. W. Garner, *Political Science and Government* (New York, 1928), Chaps. I-III.
 C. G. and B. M. Haines, *Principles and Problems of Government* (rev. ed., New York, 1926), 55-75.
 W. W. Willoughby and L. Rogers, *Introduction to the Problem of Government* (New York, 1921), Chaps. I-II.
 C. A. Beard, *American Government and Politics* (4th ed., New York, 1924), 3-15.
 R. G. Gettell, *Introduction to Political Science* (Boston, 1910), Chap. I.
 J. Bryce, “Relations of Political Science to History and to Practice,” *Amer. Polit. Sci. Rev.*, III, 1-19 (Feb., 1909).
 H. G. James, “The Meaning and Scope of Political Science,” *Southwestern Polit. Sci. Quar.*, I, 3-16 (June, 1920).
 H. M. Kallen, “Political Science as Psychology,” *Amer. Polit. Sci. Rev.*, XVII, 181-203 (May, 1923).
 F. H. Allport, “The Psychological Nature of Political Structure,” *Amer. Polit. Sci. Rev.*, XXI, 611-618 (Aug., 1927).
 C. E. Merriam, “The Significance of Psychology for the Study of Politics,” *ibid.*, XVIII, 469-488 (Aug., 1924).
 ———, “The Present State of the Study of Politics,” *ibid.*, XV, 173-185 (May, 1921).
 ———, *New Aspects of Politics* (Chicago, 1925).
 W. B. Munro, “Physics and Politics—an Old Analogy Revised,” *Amer. Polit. Sci. Rev.*, XXII, 1-11 (Feb., 1928).
 H. E. Barnes, *Sociology and Political Theory; A Consideration of the Sociological Basis of Politics* (New York, 1924).
 G. Wallas, *Human Nature in Politics* (new ed., New York, 1922).
 W. Lippmann, *Public Opinion* (New York, 1922).
The Teaching of Government, A Report to the American Political Science Association by the Committee on Instruction (New York, 1916).
 W. F. Ogburn and A. Goldenweiser (eds.), *The Social Sciences and their Interrelations* (New York, 1927).

¹H. M. Kallen, “Political Science as Psychology,” *Amer. Polit. Sci. Rev.*, XVII, 194 (May, 1923).

CHAPTER II

NATURE AND FUNCTIONS OF THE STATE

When studying government, we are concerned with the devices and practices through which that somewhat intangible institution known as the state functions in the actual, day by day, regulation of human affairs. Every government, in the political sense, is the government of a state; the government to be described in later chapters of this book is the government of a state termed the United States of America. Accordingly, at the outset it becomes pertinent to inquire, What is a state? What elements or characteristics are necessary to its existence? How did the state, as a form of human organization, originate? What purposes does it serve?

The state
a prereq-
uisite of
govern-
ment

In everyday speech, the term "state" is given half a dozen different meanings, some of them quite incorrect. Thus we often refer to regions such as China, Russia, or Australia as "states," when we are really thinking only of geographical divisions, or countries. Until the Germans framed their republican constitution in 1919, they called Saxony and Bavaria and Prussia states, although no one of these political areas had the necessary attribute of independence. We speak of New York and Virginia and Illinois as states, and rarely or never refer to the United States as a state, although in reality only the latter can, strictly, be so designated. Definitions are almost as numerous as writers on the subject, and we shall find that description, rather than definition, opens the way to a proper understanding. Here, however, are two definitions which are as serviceable as any. "The state," says the German writer Bluntschli, "is the politically organized people of a definite territory."¹ "The state, as a concept of political science and constitutional law," says an American authority (Garner), "is a community of persons more or less numerous, permanently occupying a definite portion of territory, independent or nearly so, of external control, and possessing an organized government to which the great body of inhabitants render habitual obedience."²

Various
uses of
the term

¹ *Allgemeine Staatslehre*, I, 24.

² *Political Science and Government*, 52.

CHAP.

II

Essential
elements of
a state:1. Popu-
lation

These definitions—especially the second—have at least the merit of very well indicating what are the essential factors or elements of a state. As many as six appear: (1) population; (2) territory; (3) unity; (4) political organization; (5) independence; and (6) permanence. Population and territory may be regarded as the necessary physical bases of a state. It goes without saying that a state cannot exist without people. How many people are necessary to its existence, and what relations should be maintained between number of inhabitants and area, are questions which political writers from Aristotle onwards have discussed, usually to no great advantage. It is obvious that there have been, and are today, states of very scant, and others of very vast, population, and about all that one can say is that there must be people enough to maintain political organization and to support a government. San Marino, with a population of ten thousand, and an area of thirty-two square miles, is a state no less than the United States with its hundred and five millions (in 1920) spread over a continental domain.

2. Terri-
tory

A fixed territory would seem also to be essential to a state. It is true that recognition of statehood has sometimes been extended to peoples who had no actual sovereignty over a definite territory. Thus in 1918 the Allied Powers, and also the United States, recognized the Czechoslovaks as constituting a state, although their lands were as yet parts of Austria-Hungary. In this case, however, recognition was rather in anticipation of an end to be obtained by the defeat of the Central Powers than an assertion that a full-fledged Czechoslovak state actually existed at the moment; certainly if the Dual Empire had been on the winning side and Bohemia and the remaining Czechoslovak lands had been kept under Hapsburg rule, the statehood of Czechoslovakia would have been considered as never having been anything more than a fiction, or at best a hope. The German tribes moving southward and westward into the Roman Empire at the beginning of the Middle Ages were not states. They founded states, but only when they established themselves permanently in Gaul, Italy, Britain, and other definite territories. Since ancient times the Jews have formed no state, because they have occupied and controlled no particular region of the earth.¹

¹ As a result of the World War, Palestine has become a state. But its population is far more Arab than Jewish. Besides, Great Britain's mandate leaves it only theoretically independent.

But a group of people living within a definite territory does not necessarily form a state. The inhabitants must be united in a "body politic;" they must have a government; they must be largely, if not entirely, free from external control; and their association for political purposes must have the quality of permanence. First, the state must have unity. The people that compose it may submit to and support it because they wish to do so, or because they are forced to do so; they may be of diverse races, languages, religions, ideas, and customs; their governmental system may be "unitary," as in France, or "federal," as in Switzerland and the United States. But the state itself is, and must be, an entity, no less indivisible and hardly less immutable than the individuality of a person.¹ In the second place, there must be political organization. That is, there must be recognized agencies through which laws can be made and enforced, justice administered, taxes levied and collected, public defense organized and supported. The machinery of government may be elaborate, as in highly developed states like France and Switzerland, or it may be simple and rudimentary, as in backward states like Abyssinia and Siam. But some form and degree of organization there must be.

Then, too, the state must have supreme, if not unlimited, authority. Of course, no state lives to itself alone; and in our complex modern world states are bound up in a network of interrelations which, in practice, place many restrictions upon their policies and acts. Still, every true state is fundamentally independent; at least, it is not simply part of a larger political organism. Internally, furthermore, the state must be in a position to impose its will upon all persons, associations, and things within the field of its jurisdiction.²

A final requisite of the state is permanence. Not that states

CHAP.

II

3. Unity

4. Political organization

5. Independence, or sovereignty

¹ W. F. Willoughby, *Government of Modern States*, 11.

² W. F. Willoughby, *Fundamental Concepts of Public Law*, Chap. VIII. This view of sovereignty has sometimes been challenged as coldly logical, inflexible, and legalistic, and not in keeping with actual facts or consistent with the interests of either the individual or society. It is pointed out that there are many organizations of men—in church, in the domain of scholarship, in economic life—over which the state wields little or no control; and it is argued that not only does the absolute state not actually exist, as a super-organization, all-embracing and all-controlling, but human well-being demands that it should not exist. The ideal, it is urged, is a loose, disintegrated form of economico-political organization in which the state shall hold an important place, for certain clearly political purposes, but with each trade, business, profession, and other specialized group or interest controlling its own affairs. The line of advance, we are told, is a pathway of progressively narrowing state functions and powers. No one will deny that this "pluralist" theory has made valuable contributions to political thought. It has helped show us how exceedingly complex our modern life is; and it has served as a corrective

endure forever; on the contrary, history tells of many states that have broken up and disappeared. But a true state cannot be a mere product of caprice, something to be created today and destroyed tomorrow. It must show a reasonable degree of stability and continuity. And *the state*, as an institution in the abstract, is, so far as we can see, absolutely permanent. Experience shows it to be a necessity of human existence. When one particular state dissolves or is overturned, the people who have been associated in it are certain to pass under the jurisdiction of some other state which has conquered them, which they have joined voluntarily, or which they have themselves created.

These, then, are the necessary elements of a state—population, territory, unity, political organization, sovereignty, permanence. A state is not merely a piece of territory; it is not merely an aggregation of people; it is something more than a government. Territory and people are its physical bases, and government is the instrumentality through which it speaks and acts. But the state is itself an organism transcending any and all of its component factors. In a sense it is an abstraction; yet it is no fiction. Nothing is more real in this world of ours than states.¹

How has it come about that men are everywhere found, through-

upon the idealization of the state, and upon the doctrine that the state is an end in itself, free from all moral restraints. Much of the pluralist discussion, however—like all discussion of this general topic—is befogged by confusion of state and government; and after all is said, the conclusion is still forced upon most of us that the historic view of the state as possessing, ultimately, an unlimited right of control over the affairs of men living within the territorial area of its jurisdiction is sound. On the growth of the idea of the “pluralistic” state, see H. J. Laski, *Authority in the Modern State*, Chap. I; E. D. Ellis, “The Pluralistic State,” *Amer. Polit. Sci. Rev.*, XIV, 393-407 (Aug., 1920); F. W. Coker, “The Technique of the Pluralistic State,” *Amer. Polit. Sci. Rev.*, XV, 186-213 (May, 1921); *ibid.*, “Pluralistic Theories and the Attack upon State Sovereignty,” in C. E. Merriam and H. E. Barnes [eds.], *History of Political Theories, Recent Times* (New York, 1924), Chap. III; and R. G. Gettell, *History of Political Thought* (New York, 1924), Chap. xxix. A leading school of pluralists is the guild socialists of Great Britain. See E. D. Ellis, “Guild Socialism and Pluralism,” *Amer. Polit. Sci. Rev.*, XVII, 584-596 (Nov., 1923); G. D. H. Cole, *Guild Socialism Restated* (London, 1920).

¹Two terms, or concepts, frequently confused are “state” and “nation.” Sometimes it is practically impossible to refrain from using the words interchangeably. But at all events the difference of proper meaning should be understood. The term “state” has a political and legal signification; the term “nation” denotes, rather, a racial or ethnical concept. A state includes all the people living within given boundaries and subject to a common government. These people may be of different races, languages, religions, manners, and aspirations; the state, as such, knows nothing of these dissimilarities. A nation, on the other hand, is a body of people inhabiting a more or less continuous territory, descended from a common stock, speaking the same language, and having, in general, a common inheritance and a common civilization. Political organization is not a requisite.

out the civilized world at all events, living under organized political authority? In other words, how did the state come into being? We know the way in which many particular states were created. We know how England and Italy and the United States arose. As a result of the World War, new states—Poland, Czechoslovakia, Yugoslavia—were, indeed, created under our very eyes. But how and when did the first state arise? How did the state *as an institution* come into existence?

CHAP.
II

The origin
of the
state

These questions are difficult to answer positively, for the reason that the beginnings of the state far antedate recorded history. Aristotle indeed tells us that the state was the highest and last of the associations formed by man. But even in his day, more than twenty-two hundred years ago, the state was an ancient institution, whose origins were no better known than they are at the present time. Unable to penetrate the obscurity which surrounds the subject, writers on political matters have been obliged to content themselves with conjecture; and of this there has been a very great amount, from the days of Plato and Aristotle onwards.

Principal
theories:

Four or five main theories have been propounded. The first is that of divine origin. The adherents of this doctrine hold not only that the instinct for orderly association was divinely planted in human nature, but that God vested political power in certain persons or groups of persons, who thus became his vicegerents on earth. In the Middle Ages, when political writers were apt to be churchmen and theologians, this view was widely held, and in the sixteenth and seventeenth centuries it became a main reliance of the monarchical governments—notably of the Stuart kings in England and the Bourbon rulers of France—in their resistance to the growing ideas of popular sovereignty. The whole notion of the divine right of kings springs directly from it. It is hardly necessary to add that the theory never had any basis of fact, and that it now has no standing among political scientists.

1. Divine
ordinance

A second theory is that of the social contract. It assumes that there was a time when men were entirely without political organization—when the only laws governing their actions were those prescribed by instinct, by reason, or by nature itself. Gradually this “state of nature” breaks down. For reasons upon which the exponents of the theory are by no means agreed, people find it desirable to enter into new and definite relationships; and this they do by coming together and agreeing to set up a civil society or body politic. The individual submits his hitherto unfettered will to the

2. Social
contract

will of the group; in return, he receives protection, and perchance other benefits. To fix rights and duties, a code of law arises; to execute the public will, a government is created; and thus, by the deliberate bargaining of a body of men having common interests, a state is brought into existence.

This theory has much attractiveness. Traceable as far back as Plato, it became, in the seventeenth and eighteenth centuries—when it was persuasively expounded by the English writers Hobbes and Locke and by the French philosopher Rousseau—a favorite political doctrine. The original application of it was made, as has been explained, to the formation of states by the members of communities previously possessing no civil authority. A second application, which also gained wide acceptance, was to the contractual relationships conceived of as being entered into between a community already politically organized and a particular magistrate or ruler. The two processes are, of course, quite distinct. The one is a true social contract, and establishes a state; the other is rather a political compact, and establishes a government. The doctrine of contract, in both of these forms, was at the zenith of its influence in the second half of the eighteenth century, and was quite familiar to Thomas Jefferson and those who worked with him in building the new American nation. The Declaration of Independence boldly proclaimed that governments derive their just powers from the consent of the governed, and similar sentiments are to be found in most of the state constitutions framed in the Revolutionary period, especially in their bills of rights.¹

In so far as it seeks to account for the origin of the state (as distinguished from particular governments), the doctrine of the social contract is not nowadays widely held. It has no foundation in history; for although there are known instances in which people finding themselves without a political organization have contracted to set up one—the Mayflower Compact of 1620 is a notable illustration²—there is no case on record in which a body of men who

¹C. E. Merriam, *History of American Political Theories*, 49. The doctrine is set forth in the preamble of the Massachusetts constitution of 1780 as follows: "The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good."

²As is pointed out by Garner, in this case the covenanters expressly acknowledged that they were "loyal subjects" of an existing sovereign and their purpose was not to create a state but to extend an existing state to a country not yet inhabited by civilized peoples. *Political Science and Government*, 225, note.

had never formed part of any state deliberately fabricated a state for themselves. Furthermore, it is difficult to believe that a primitive folk, ignorant of government, would, or could, consciously set about the creation of that most complex of human institutions, a state. "Men must have known," says one writer, "what a government was before they could make one." Still more necessary does it seem that they should have had political experience before building—if they ever did consciously build—a state. Like the divine origin theory, the twin theories of the social contract and the political compact gained their remarkable vogue because of the practical use that was found for them. James I, Louis XIV, and their brother monarchs discovered in the divine theory a main prop of their power; similarly, oppressed and discontented peoples found in the compact theories a plausible basis for resistance to tyranny.

CHAP.
II

A third theory seeks to account for the state as an outcome of the expansion of the family. People who hold this view find in blood relationship a social tie which eventually becomes also a political bond. They assume that the original social unit was the patriarchal family, composed of a man, his wife (or wives), his unmarried daughters, and his sons, with their wives and families; although some maintain that before the patriarchal family group arose, people lived in miscellaneous hordes or packs in which descent was traced in the female line. At all events, the view is that by natural stages the family broadens into a clan, the clan becomes a tribe, and the tribe becomes a nation, which is the ethnical basis of a state. The family is ruled by the father; the clan, by a leading kinsman, or patriarch; the tribe, by a chief; the nation—which at length organizes itself as a state—by a king.

3. Development from the family

This theory is simple and at first glance plausible. It has the weight of influential support, beginning with Aristotle himself. But the most that can be said for it is that it probably supplies the explanation of the origin of a particular state here and there, without furnishing any general clue to state development in general. There is no historical proof that either the patriarchal or the matriarchal family was universal in primitive society, or that the state regularly appeared only after the clan and the tribe had taken form. Indeed, some authorities hold that the actual course of social evolution was quite the reverse of that described—that the tribe was the oldest social group, that the tribe broke into

Lack of evidence

4. Force

clans, and that the clan disintegrated into families, and these, in turn, into the individual members of society.¹

Still another view is that the state is a product of force. In times of primitive lawlessness, we are told, strong men established their sway over the weak; or, perchance, military leaders took advantage of their preëminence to hold their followers habitually under control. The leader becomes a chieftain, the chieftain becomes a king, the tribe becomes a kingdom—all by the use, or threat, of compulsion. The kingdom may continue to expand by conquest; it may become a mighty empire, holding sway over vast and unwilling populations. But here again there is doubt. That power to compel obedience and to resist attack is a main characteristic of the modern state, no one needs to be told. That some states, modern as well as ancient, were created by "blood and iron," is equally familiar. But that force was the sole, or even the main, factor in the creation of the original state few scholars of today are prepared to believe. Speaking broadly, the rôle of force seems to have been the consolidation of states rather than their initial establishment.

No one
of these /
theories
satisfactory

What, then—if not divine ordinance, or social contract, or patriarchal authority, or physical compulsion—shall we look upon as the original impetus or method of state-building? It would be agreeable to be able to reply with some explanation that would be as simple, consistent, and appealing as the four that have been discarded. But regard for the truth forbids. The precise circumstances under which human beings were first grouped in states must forever remain unknown. Both history and reason, however, assure us of certain things. The first is that the state was not suddenly and mechanically made. It is not to be referred back to any given point of time; it was not the outcome of any plan; it can be ascribed to no single influence or power. Rather it was "a growth, an evolution, the result of a gradual process running throughout all the known history of man, and receding into the remote and unknown past."² Individual states have sometimes been created by specific acts, almost at a stroke; but the state as an institution is much too complex, and corresponds to human needs far too advanced, to have been brought into being by mere fiat.

A second fact to be observed is, however, that there are elements

¹ E. Jenks, *History of Politics*, Chaps. I-II.

² S. Leacock, *Elements of Political Science*, 41.

of truth in all of the theories presented above. "The divine element," says a writer already quoted, "appears in the fact that the Creator has implanted in the human breast the impulse which leads to association, and in the part played by religion in bringing primitive man out of barbarism and accustoming him to law and authority. The element of compulsion exercised by those who possess natural superiority is a powerful ally of both religion and evolution in bringing the natural man into political and social relationship with his fellows. Finally, the elements of contract and consent which lie at the basis of all association play an important part in the process of establishing and reorganizing particular governments. No one of these elements alone accounts for the existence of the state, but all working together, some more prominently than others; and all, aided by the forces of history and the natural tendencies of mankind, enter into the process by which uncivilized peoples are brought out of anarchy and subjected to the authority of the state."¹

CHAP.
II

Yet truth
in all of
them

It will not do to assume that all men regard the state as having a legitimate purpose. There are schools of thought which teach that the state is essentially and necessarily an instrument of tyranny, and that therefore it ought not to exist. This is at once recognizable as the doctrine of anarchy. People who accept it consider the liberty of the individual the all-important thing and regard the restrictive authority of the state as without benefit or justification. They do not in all cases approve of violence as a means of breaking down the state's authority, and they do not have in view an absolutely atomistic society, devoid of all cohesion and united action. But they would do away with state compulsion, and would substitute for it the purely voluntary association of such individuals as might find it to their advantage to combine for the protection of their lives or property, or for other purposes. To most of us it seems fairly clear that these so-called voluntary associations would be of no use unless they exercised coercive power against non-members; that, if effective, they would be likely to prove no less restrictive and arbitrary than states; that they would almost certainly be unstable and transitory; that the liberty which would be gained by the removal of state control would be only that of the strong to exploit the weak—in short, that anarchism is without basis in either logic or common-sense. Its doctrines have,

Views on
the func-
tions of
the state:

1. The
anarchist
view

¹ J. W. Garner, *Introduction to Political Science* (New York, 1910), 122. See W. W. Willoughby, *Fundamental Concepts of Public Law*, Chap. XI.

however, at times made strong appeal both to philosophic radicals and to discontented workingmen.¹

The anarchists hold that the state is neither desirable nor necessary. Another school takes the view that while the state is not inherently desirable, it is a practical necessity. This is the individualist school, whose chief tenets are (1) that if human nature were so refined that men would always deal justly with one another there would be no need of the state; (2) that since this happy condition does not exist, some coercive force is necessary; (3) that this force can be applied only by the state, acting through its recognized organs of government; (4) that the proper province of the state does not extend beyond the protection of life, liberty, and property; and (5) that as man's regard for order and justice increases, state control should be relaxed until, theoretically at least, the vanishing point is reached.

This body of doctrine assumed its largest importance in the second half of the eighteenth century, when western Europe was stirred by powerful protests against the despotic and paternalistic policies pursued by unreformed monarchical governments. On the economic side, the principles found application in the teachings of Adam Smith and the French physiocrats, in the repeal of countless trade and industrial restrictions, in the triumph of the ideas identified in England with the Manchester school and commonly summed up in the phrase *laissez-faire*. On the political side, the doctrine was similarly reflected in the overthrow of absolutism in France, the relaxing of government control over certain fields of human activity, and the emphasis placed upon private rights in the American Declaration of Independence and the Revolutionary state constitutions. The English sociologist Herbert Spencer argued that the state should not maintain a postal system or a mint, that it should not undertake to regulate labor in mines and factories, that it has no right to interfere with the wise severity of nature's discipline by legislation on poor relief and on matters of health. Indeed he went so far as to contend for the right of every individual to decide for himself whether he will obey a government or will "adopt a condition of voluntary outlawry."² The French philosopher Jules Simon asserted that the supreme obligation of the state is to make itself useless and to prepare for its own extinc-

¹ The best exposition of philosophic anarchism is to be found in Prince Kropotkin's *Fields, Factories, and Workshops* (1899).

² *Social Statics* (London, 1850). See extract in W. R. Browne, *Man or the State* (New York, 1919), 90-99.

tion. And an American president, Thomas Jefferson, pronounced that government best which governs least, and in his messages and inaugural addresses repeatedly mapped out a national program frankly based upon individualistic principles. Level-headed men like Spencer and Jefferson did not expect human nature to attain such perfection that all government could be dispensed with. But this did not prevent them from conceiving of the state, and of government itself, as a necessary evil, or from limiting the proper functions of the state to keeping the peace and punishing crime. For upwards of a hundred years this grudging, negative conception of the state held governmental activities within limits which to twentieth-century ways of thinking are quite impossible.

The arguments chiefly employed in support of the individualistic view of the state have been (1) that the individual has a "natural right" to be let alone; (2) that every person, in the long run, knows his own interests best, and, in the absence of arbitrary restrictions, can be trusted to follow them; (3) that the laws of human progress require that every man shall struggle for himself and survive or go down according to his fitness; (4) that over-government stifles individual initiative and development; and (5) that the state is not omniscient or infallible, as is proved by the large amount of blind, partisan, meddling, and unfair regulation for which it has been responsible in the past.

There is truth in all of these contentions, and a general presumption may be conceded against state interference wherever no strong positive reason for interference can be shown. However, it can be argued with equal force that as against the state the individual has no "natural rights;" that, far from knowing their own interests best—in such matters, for example, as education and sanitation—most people have not, and cannot be expected to have, the information or experience necessary for wise decisions; that no amount of individual comprehension of interests and needs can be of avail without coöperative action, as for example in the maintenance of schools, the construction of streets, and the regulation of railways; that the competition of individuals which whets the wits and brings capacity to the top can proceed to best advantage only where a superior power, the state, equalizes to some extent the conditions of competition and raises the struggle to a humane and moral plane; and that the errors committed in the name of state regulation, although undeniably many, have been so portrayed by the *laissez-faire* writers as to produce an exaggerated impres-

sion. The exponents of the individualist doctrine make the mistake of assuming that state action always and necessarily restricts freedom, that government and liberty are incompatible. The state unquestionably does restrict freedom in some directions. But, on the whole, it makes possible a larger freedom than could be attained without it. Far from being mutually antagonistic, government and liberty go well together, as the history of almost any country, and especially of English-speaking lands, abundantly demonstrates.¹

3. The col-
lectivist
view

Indeed, the crowning argument against the individualist doctrine rests, not upon theory, but upon experience. At the middle of the nineteenth century individualism was at flood-tide. Even at that date, changed economic and social conditions, flowing largely from the Industrial Revolution, called loudly for the regulative and corrective action of the state; and as succeeding decades passed, the need of such action steadily grew. There had always been people who dissented from the teachings of the individualists; and under the stress of the new conditions those doctrines gradually fell into discredit. To the old notion of the state as a necessary evil, and of government as existing only to keep men from injuring one another, succeeded a conception of the state as the supreme, indispensable, and inherently desirable promoter of human welfare, and likewise a view of government as an active, positive, expanding, regulative force, by no means restricted to the mere protection of individual rights. Indeed, the emphasis nowadays falls upon rights and obligations of a social, rather than an individual, nature. The state, through the agency of government, curbs individual action all along the line in the interest of the public well-being. It sanctions some industries and prohibits others, and regulates in great detail the conditions of employment. It issues charters to railroad, telegraph, and other corporations and prescribes the manner in which they shall carry on their business and keep their accounts. It licenses and controls banks and insurance companies. It limits combinations of capital and of management when it can be shown that their effect is to restrain trade unreasonably. It compels the citizen to educate his children and to refrain from acts that would endanger the health of the community. It seeks to prevent him from living in a badly ventilated house, or eating adulterated food, or drinking water that is pol-

¹ This subject is treated historically in J. W. Burgess, *The Reconciliation of Government with Liberty* (New York, 1915).

luted. It says who may teach school, practice medicine, sell drugs, pilot ships, and cut hair.

CHAP.
II

We are accustomed to think of the changes which science and invention have produced in the modes of human life as the most notable development of modern times. But from many points of view even this stupendous transformation is eclipsed by the revolution of thought (for which, indeed, the new physical and economic conditions were mainly responsible) which has led the state to extend its regulative action into one new field after another, and has brought the functions of government to their present amazing proportions. Nowhere have the effects of this political change been greater or more interesting than in our own country, where we shall presently study them in some detail.

Notable
extension
of state
regulation

The reaction against the eighteenth-century philosophy drove some men great distances, and as a result certain schools of thought arose that stand at the opposite pole of the political universe from individualism. The most important of these is the "state socialist" school, which dominated Germany during the transition to the present republic, and which has a great following in England, France, and Italy, and a considerable hold in many other lands. There are socialists of many types. But with few exceptions they consider that the ills of modern society spring mainly from inequalities of wealth and opportunity, and that these inequalities are the natural and inevitable product of the free play of self-interest, of the competition of individual with individual, each seeking his own advantage. Not less regulation, they say, is required, but more; the state is not an evil, but a supreme and positive good. They would have much more regulation than there is at present in such domains as public health and education. They would bring railroads, canals, ships, telegraphs, telephones, gas works, waterworks, electric light plants, and other utilities under public ownership, national or municipal. But, above all, they would do away with private ownership and control of the instrumentalities of production and distribution of goods. They would have the state itself become, on a grand scale, an owner, employer, and manager, in all that pertains to the economic relationships of men. Private property would not absolutely disappear. But it would be confined to such objects as could not be made the basis of personal power or advantage. Land, mines, mills, factories, machinery, stores, banks and businesses, capital in all of its forms, would belong to the state, and the state would be trusted to utilize these

Socialism

agencies of wealth in such a way as to secure the maximum of justice, enlightenment, and general well-being.

Enough has been said to indicate how sharply men disagree in their views of the purposes for which the state exists. Whether, indeed, the state is an end in itself or whether it is only a means by which individuals attain their several ends, is a question that has been warmly debated through the ages. The ancients thought the state an end in itself, and either flatly denied or sharply curtailed all individual rights and liberties that seemed inconsistent with its dominance and complete development. Few, if any, people nowadays hold such an opinion; even the socialists, while magnifying the sphere and powers of the state, constantly look to the well-being of the individual citizen as the end to be sought. We may therefore assume that the state is not an end, but a means.

This, however, merely raises afresh the question of what end, or ends, the state is meant to serve. As has appeared, many answers to this query have been given. If we look for one which takes adequately into account the varying points of view historically developed, we will not do badly to lay hold of the explanation offered by a leading American political scientist, as follows: "The original, primary, and immediate end of the state is the maintenance of peace, order, security, and justice among the individuals who compose it. This involves the establishment of a régime of law for the definition and protection of individual rights and the creation of a domain of individual liberty, free from encroachment either by individuals, or by associations, or by the government itself.¹ No state which fails to secure these ends can justify its existence . . . Secondly, the state must look beyond the needs of the individual as such to the larger collective needs of society—the welfare of the group. It must care for the common welfare and promote the national progress by doing for society the things which common interests require, but which cannot be done at all or done efficiently by individuals acting singly or through association . . . This may be called the secondary end of the state. The services embraced under this head are not absolutely essential to the existence of society, but they are desirable and are in fact performed by all modern states. Finally, the promotion of the civilization of mankind at large may be considered the ultimate and highest end of the state . . . Thus the state has a triple end: first, its mission is the advancement of the good of the individual; then it should

¹ These matters are discussed more fully below. See pp. 61-64.

seek to promote the collective interests of individuals in their associated capacity; and, finally, it should aim at the furthering of the civilization and progress of the world, and thus its ends become universal in character.”¹

REFERENCES

- J. W. Garner, *Political Science and Government* (New York, 1928), Chaps. IV-XI.
- W. F. Willoughby, *The Government of Modern States* (New York, 1919), Chaps. II, IX.
- C. G. and B. M. Haines, *Principles and Problems of Government* (rev. ed., New York, 1926), 1-54, 625-655.
- S. Leacock, *Elements of Political Science* (Boston, 1907), 3-70, 89-109, 357-410.
- R. G. Gettell, *Introduction to Political Science* (Boston, 1910), Chaps. II-VII, XI-XII, XXIV-XXV.
- E. Jenks, *The State and the Nation* (New York, 1919), Chaps. IIX, XVI.
- W. W. Willoughby, *Fundamental Concepts of Public Law* (New York, 1924), Chaps. V-VIII, XVI-XVII.
- A. N. Holcombe, *Foundations of the Modern Commonwealth* (New York, 1923), Chap. II.
- C. E. Merriam and H. E. Barnes [eds.], *History of Political Theories, Recent Times* (New York, 1924), Chap. VI.
- F. W. Coker, *Readings in Political Philosophy* (New York, 1914), 53-71 (Aristotle's views), 302-331 (Hobbes' doctrines), 385-406 (Locke's opinions), 479-496 (Rousseau on the social contract).
- F. Oppenheimer, *The State; its History and Development Viewed Sociologically*, trans. by J. M. Gitterman (Indianapolis, 1914).
- H. W. Laidler, *Socialism in Thought and Action* (New York, 1919).
- , *A History of Socialist Thought* (New York, 1927), Chap. XXIX.
- W. E. Walling and H. W. Laidler, *State Socialism Pro and Con* (New York, 1917).
- J. R. Commons and J. B. Andrews, *Principles of Labor Legislation* (new ed., New York, 1920).
- H. Carter [ed.], *The Limits of State Industrial Control* (New York, 1919).
- E. Barker, *National Character* (New York, 1927).

¹J. W. Garner, *Introduction to Political Science*, 316-317.

CHAPTER III

CONSTITUTIONS AND GOVERNMENTS

Kinds of
constitu-
tions

The principles, rules, forms, and usages which determine the structure of a government and define its powers are known as a constitution; and just as there is no state without a government, so every government rests upon a constitution, however rudimentary it may be. The term, it is true, was not used in its present sense before the seventeenth century. But this does not alter the fact that there was an Athenian constitution, a Roman constitution, a Frankish constitution; or that there is an English constitution which, in some of its parts, is as old as English civilization itself. Constitutions are, naturally, of many kinds, and can be classified in various ways. Considered from the point of view of the type of government for which they provide, they may be democratic, aristocratic, oligarchic, or autocratic; in form, they may be written or unwritten; as to facility of amendment, they may be flexible or rigid. On the basis of origin, too, they fall into three main groups: (1) those which, like the English constitution, are the product of growth through a long period of time; (2) those which, like the Italian *Statuto* of 1848, have been granted by a ruling prince; and (3) those which, like the constitution of the United States, have been created by the deliberate act of a sovereign people.

Different
meanings
of the term

Most persons instinctively think of a constitution as a written instrument, a *document*, formulated and put into operation at a given moment in a nation's political experience. Thus we say that the instrument which in 1789 superseded the Articles of Confederation, plus the nineteen amendments afterwards added to it, is the constitution of the United States; or that the British North America Act of 1867 is the constitution of the Dominion of Canada. This use of the term is, of course, entirely proper. Nevertheless, there is another and broader meaning which students of government have learned to recognize. France before 1789, Austria before 1867, Russia before 1906, had a constitution; that is to say, in each of these states the government was organized and public affairs were managed in accordance with a more or less definite

body of principles, rules, forms, and usages. One would have searched in vain for any document or group of documents in which these rules and customs were set down. But in a very real sense they formed the warp and woof of constitutional systems. The English constitution is not only the oldest but the most influential of all constitutions known to history. But it was never "made" or "adopted." Rather, it is a slowly formed composite of ancient agreements (such as Magna Carta), parliamentary statutes pertaining to governmental machinery or powers, rules of the common law, and great numbers of "conventions," or simple understandings, usages, and assumptions which have gained recognized force in the actual relations and operations of the public authorities.¹

CHAP.
III

Of late there has been a pronounced tendency to put constitutions rather fully into written form; even in England, the increased frequency of statutes defining the structure and powers of government has brought it about that a larger portion of the constitution is now in writing than at any earlier time. As the history of institutions is measured, the written constitution is, however, as yet somewhat of a novelty. The pioneer in constitution-making was America, and the earliest constitutions framed by deliberate act were those which the several states adopted, on the advice of the Continental Congress, in 1776, and succeeding years, together with the Articles of Confederation, drawn up in 1777.² From America the idea passed to France, and in 1791 that state received the first of the seven successive written constitutions under which it has lived during the past century and a quarter. Beginning with the Cisalpine republic in 1797, Napoleon spread his paper plans of government over all Italy and Spain, and over much of Germany, and by 1815 it was commonly considered on the Continent that any political system that made pretension to liberalism must be based on a written constitution. Most European constitutional documents dating from the first half of the nineteenth century were promulgated by princely authority. But some—as the Belgian in 1831 and the Swiss, German,³ and French in 1848—were made and adopted by the people or by their repre-

Develop-
ment of
written
constitu-
tions

¹ On this subject see F. A. Ogg, *The Governments of Europe* (rev. ed., 1920), Chap. iv.

² Strict accuracy requires it to be noted that the English Civil War produced three written constitutions, and that one of them—the "Instrument of Government," drawn up by some of Cromwell's officers in 1653—was in actual operation for about three years.

³ Formulated at the Frankfort convention, but never put into operation.

sentatives; and subsequently the tendency to a popular basis became pronounced. The German republican constitution of 1919 was framed by the most broadly representative body of the kind ever brought together.

As has been pointed out, however, the whole of the actual constitution of a state is never to be found in a text or a group of texts. Sometimes the written instrument is quite obviously incomplete. This is the case in France, where the three *lois constitutionnelles* adopted by the National Assembly in 1875 not only contain no guarantees of private rights, but say little about the judiciary and the election of deputies and nothing at all about several other weighty matters. But even where the written constitution is lengthy, systematic, and detailed—as was that of the German empire, or as is that of the Swiss republic—the formal, written instrument becomes merely the core of the constitution, around which develops a great body of statutes, customs, and forms comprising no less binding, and hardly less important, parts of the real constitution than do the formal, written provisions. One who would understand a governmental system must therefore look far beyond the written constitution under which the system is presumed to operate. The language of that instrument may, indeed, be positively misleading. Thus, from a reading of our national constitution the foreigner would certainly gather the impression that the presidential electors exercise full individual discretion in voting for candidates for the presidency and vice-presidency; whereas we know that it has become, by usage, a principle of the *actual* constitution that these electors shall automatically register the will of the voters who have chosen them for the electoral college.

The classification of constitutions as written or unwritten is worth something. But it must not be pressed too far, for all bodies of fundamental law are at the same time partly written and partly unwritten, the difference being merely one of degree. Thus the English constitution, commonly thought of as unwritten, is to be found to a considerable extent in documentary form, while on the other hand the constitutions of Italy and Hungary, properly classified as written, are “in reality so overlaid with custom and possess such a high degree of flexibility that they contain more elements of true resemblance to the British constitution than to the constitution of the United States.”¹

¹J. W. Garner, *Political Science and Government*, 514. On the advantages and disadvantages of constitutions which are mainly reduced to writing see *ibid.*, pp. 524-528.

Written constitutions are, as a rule, instruments of special sanctity, drawn up by some authority different from that which makes the ordinary laws, and alterable by a process unlike that by which these laws can be changed. The main distinction between constitutional law and statutory law is, however, one of substance rather than of form; for in many cases there is no difference of form at all. Thus in England measures that become parts of the constitution are framed and adopted by precisely the same authority, *i.e.*, Parliament, and in exactly the same manner, as ordinary statutes. There is no way of telling what parliamentary acts are to be regarded as constitutional and what to be regarded as merely statutory except by reference to their content. Those that relate to the distribution and exercise of the sovereign power of the state may be set down as constitutional, and everything else as statutory.

A fully developed written constitution may be expected to contain provisions upon at least the following fundamental matters: (1) individual liberties, *i.e.*, guarantees against arbitrary actions of the government in its dealings with the people; (2) the structure, or mechanism, of the governmental system; (3) the distribution and limitations of governmental powers; (4) the composition of the electorate; and (5) the conditions under which, and the mode by which, the constitution can itself be amended. Provisions on these subjects may be brief, broad, and general, or they may be detailed and minute. And most constitutions contain, in point of fact, many articles or sections having to do with matters that are really statutory rather than constitutional in their nature. Such constitutions are, notably, those of Switzerland, the former German empire and the present German republic, and certain of the newer American states, notably Oklahoma. Ideally, however, the constitution should be confined to fundamentals; brevity, along with clearness, is a quality most earnestly to be sought. As will be pointed out, the constitution of the United States is both brief and clear, and on this account has been admired—although not always imitated—the world over.

It has often been remarked that constitutions are not made but rather grow. This is literally true of certain constitutions, notably the English; and it is true of all in the sense that change is constantly going on. In a thoughtful essay published several years ago Lord Bryce developed as a substitute for the largely meaningless classification of constitutions as written and unwrit-

CHAP.
IIIConstitu-
tions and
statutes
disting-
uishedContents
of written
constitu-
tionsThe
growth of
constitu-
tions

ten a new classification as flexible and rigid.¹ His idea was that a flexible constitution is one which can be modified by the same authority that makes the ordinary laws, and after the same form of procedure. The English constitution would be the best illustration. A rigid constitution, on the other hand, is one which can be amended only by bringing into play special constitution-making machinery and methods. The constitution of the United States affords a good example. This classification has value. Yet it, too, is subject to important limitations. For example, it would lead to the labelling of the constitution of France as rigid, for the reason that the two houses of Parliament, sitting in their respective halls in Paris, cannot adopt amendments. But the very same men, sitting in joint assembly at Versailles, have full and exclusive power to amend. Constituent and legislative proceedings admittedly differ; yet the authority is the same, the time required to get action is very brief, and in practical fact the constitution of the republic is one of the most flexible in Europe.

The written constitutions framed in the eighteenth and early nineteenth centuries were, as a rule, excessively rigid. Some made no provision whatever for change; some even solemnly declared themselves immutable. Gradually, however, it came to be realized that, while stability is a virtue in a governmental system, elasticity is hardly less desirable; and while effort is still occasionally made to place certain features of fundamental law beyond the power of amendment,² such provisions are, after all, absolutely subject to the sovereign will of the people of the state. Ordinarily, all parts of a constitution are equally open to amendment.

Constitutions grow in four principal ways: by usage, by judicial interpretation, by statutory amplification, and by formal amendment. Usage is, of course, the principal mode of expansion of such constitutions as have not been reduced to written form. It also contributes heavily to constitutions which, like the English, are partly written and partly unwritten. Indeed, it plays a highly important rôle even in cases where the constitution is more definitely of the written type, as in the United States, France, and Germany.

¹ "Flexible and Rigid Constitutions," in *Studies in History and Jurisprudence*, 124-215.

² Illustrations include the provision of the constitution of the United States that "no state without its consent shall be deprived of equal suffrage in the Senate" (Art. V), and the French constitutional amendment of 1884 to the effect that "the republican form of government shall not be made the subject of a proposed revision."

Judicial interpretation arises from the practical necessity which devolves upon the courts in applying constitutional provisions to say what these provisions mean and what can properly be implied from them. The provisions are themselves commonly broad and general; occasionally they are actually ambiguous. They therefore admit of varied interpretations. Besides, new circumstances continually raise new questions and invite new and varying applications. Nowhere do the courts have greater power in this direction than in the United States; and nowhere do their interpretations and constructions add more to the constitution. In the language of Professor Garner, "it is almost a commonplace to say that a very large part of the constitution of the United States consists of judicial *addenda*. Almost every clause has been the subject of interpretation and construction; and if we were to strip it of the meanings that have been added by the courts during its existence of more than a century we should hardly be able to recognize it."¹

Statutory amplification is another important mode of constitutional growth. Nothing is more common than for statutes to set forth the manner in which broad and general constitutional provisions shall be applied. For example, the constitution of the United States requires members of the national House of Representatives to be chosen directly by the people in the several states; but it is acts of Congress that require them to be elected in single-member districts, by secret ballot, and on the same day throughout the country.

Finally, constitutions may be altered by express amendment; and there is hardly a written organic law today except the Italian *Statuto* that does not provide a mode by which this can be done. As has been stated, the requisite machinery and processes may differ from or be identical with those employed in ordinary legislation. Where, as in England, they are completely identical, the sovereign electorate has consciously or unconsciously, temporarily or permanently, surrendered its natural and inherent power of constitution-making into the hands of the government; whence arises this curious situation, that the government, although theoretically only an agent with limited powers, and morally responsible to its principal, the electorate, is, in fact, entirely free to determine its own character, organization, powers, and procedure.² Constitu-

CHAP.
III2. Judicial
interpreta-
tion3. Statu-
tory ampli-
fication4. Formal
amend-
ment¹ *Introduction to Political Science*, 404.² W. F. Willoughby, *Government of Modern States*, 121. The principle is, however, gaining favor that no far-reaching changes in the governmental system ought to be made until after the people have been consulted at a general election.

16022

tional laws cease to be legally distinguishable from statutes; and De Tocqueville's observation that there is no English constitution becomes true, in the sense that there is no superior law which is beyond the power of the legislature to modify or rescind. Where, as in France, constituent and legislative powers are in the same hands, although the manner of exercising them is different, the same situation obtains, except that constitutional enactments are marked off from statutes by the method of their adoption, and hence tend to acquire a somewhat superior status.

Constitutional amendment by the electorate

There are, however, states in which the power of amending the constitution is kept, largely or wholly, in the hands of the electorate, where it logically belongs. This is true in Switzerland, and in a more limited way in the German republic. And it is the plan on which Americans have proceeded, at all events in connection with their state constitutions. Except in the State of Delaware, there is no American government today, national or state, that can of its own force make any change in the formal organic law under which it operates.¹ Except in the state mentioned, the electorate (or, in the case of the national constitution, the state legislatures representing the electorates in the several states) must be directly consulted. The manner in which the electorate participates usually depends in part upon whether a general revision is contemplated, or only a change of certain specified clauses. But in one or more of the three usual stages or processes—initiation, deliberation, and ratification—the people or their representatives chosen specially for the purpose have, in all states except Delaware, an active share.

Various modes of classifying governments

In the final analysis, every state determines for itself what kind of government it will have,² and a great variety of forms results. The difficulty is not to find bases for classification, but to decide which of the many bases that suggest themselves are most fundamental and significant. Thus, governments are often classified

¹ Even in Delaware a constitutional amendment, after being "proposed" by a two-thirds vote in both houses of the legislature, can be finally adopted only by a similar vote in the ensuing, newly-elected legislature; and the pending amendment must be given general publicity in advance of the legislative elections.

² For the sake of clearness, it may be suggested that this does not mean that the people composing the state will always actually and literally decide what their form of government shall be. It means only that they have the right, i.e., the legal power, to do so. By assenting to, and obeying, a government which they have not themselves created, they, in effect, select it as against some other government which they might, with entire legality, decide to set up in its place.

as hereditary and elective, although no government is entirely the one or the other; or as presidential and parliamentary, although this distinction does not go beyond the relation of the legislature to the executive. Even the familiar distinction of unitary and federal governments, while extremely important, rests only upon a difference of the distribution of governmental powers, and does not reach bed-rock.

CHAP.
III

Upon what, then, do governments differ most fundamentally? The answer is supplied by a moment's consideration of what government is and of what it does. Government, as we have seen, is the instrument through which the state exercises those parts of its sovereign power which it wills to have exercised, yet does not undertake to exercise by its own direct action. It is to exercise sovereign powers, and for this purpose alone, that government exists. But somebody must say how these powers are to be construed and applied and must see that they are carried out. Who, under any given governmental system, does this? Is it a king or other prince? Is it a special privileged class of citizens? Is it the general body of the people or their chosen representatives? It must be one of the three, and everything depends upon which one. Here we have the point at which governments differ most profoundly; and the classification that arises is none other than the old and familiar one: autoocracies, oligarchies, and popular governments, commonly termed democracies. No more scientific or useful classification can be made.¹

The main
basis of
distinction

In an autoocracy the will of the prince is law; all political officers and organs are his agents; all acts of government are his acts. It does not, however, follow that all autoocracies are alike. Two main types can be distinguished, absolute and limited. In an absolute autoocracy the exercise of sovereign power is wholly despotic; that is, it is dictated solely by the immediate personal desires of the prince. In a limited autoocracy, on the other hand, the prince chooses to be guided—normally, at all events—by a body of rules and customs, which may even find embodiment in a written constitution. The distinction must not be pressed too hard; for no matter how far a limited autoocracy may go in the practice of liberalism, it remains an autoocracy: the prince has himself, directly

Auto-
cracies

¹ It will be noted that the term "autoocracy" is used, not the term "monarchy." The presence or absence of a monarch is not the determining factor. The English government is of the popular type, notwithstanding the survival of kingship. It is the spirit, rather than the form, that counts; although there is usually a tolerably close relation between the two.

or indirectly, fixed the restraints under which he rules, and he is legally free to throw them off at any time. Prussia before 1850, Japan before 1867, Russia before 1906, Turkey before 1908—all were autocracies of the absolute, or despotic, type. On acquiring written constitutions in the years mentioned, each achieved a certain degree of liberalism. Yet, as the world knows, in none were the essentials of the autocratic system given up.

Oligarchies

The oligarchic type of government calls for little comment. The essence of it is the exercise of sovereign powers by a special, and usually a small, class of persons whose privilege arises from birth, wealth, reputed superior wisdom, or even a priestly function. There have been few true oligarchies in the past, and there are none of importance today. Perhaps the best example is the Venetian republic in the fourteenth and fifteenth centuries.

Popular
govern-
ments

The third type of government is one in which the exercise of sovereign powers—or, rather (what legally amounts to the same thing), full and direct control over the agencies that wield these powers—rests with the general mass of the people. In the entire history of government no concept is encountered which compares in importance with this idea of popular sovereignty. In a sense, the notion is both old and new. The mighty Eastern states of antiquity—Phœnicia, Assyria, Babylonia, Egypt—were pure despotisms. The early Greek and Roman republics, however, had a popular basis, and at Rome the theory of popular sovereignty survived long after the rise of the centralized Empire had obliterated the last vestige of actual popular control. The Middle Age was dominated by the idea of autocratic power—whether of emperor, king, or pope—wielded by divine right; and only in the era of the Protestant Revolt and the English Civil War was the view again widely and convincingly expounded that the people have a right to control the governments that hold sway over them. As an alternative to the doctrine of divine right, the theory was developed that the prince's title rose from a compact between himself and his subjects, or even from a "social contract" among the people themselves by which they agreed that they would submit to the control of a given princely government. These ideas of contract did not correspond to any ascertainable historical facts, but they served as the levers by which the doctrine of divine right was, speaking broadly, forever dislodged from the human mind.

Growth of
popular
government

As a result of the revolution of 1688, England became the first great modern state to achieve a government based on the sov-

ereignty of the people. A hundred years afterwards the principle found fresh and convincing expression in the state and national constitutions of America, and in the revolutionary constitutions of France. In the nineteenth century it continued its conquests both in Europe and outside, and in the early years of the twentieth it made considerable headway in states, such as Russia, Turkey, China, and Japan, where autocracy still held sway. During and after the World War, it transformed political conditions in Germany, in "succession" states formed out of Austria-Hungary, in new states which split off from Russia, and even in Egypt and India.¹

CHAP.
III

We are so accustomed to the idea of popular government, and so fully in sympathy with it, that we hardly think seriously of undertaking to compare the principle of autocracy with it, in order to determine the relative advantages and disadvantages of the two. Yet such a comparison is worth while. It tends to impress the fact that in government, as in other fields of human action, few things are wholly good or wholly bad, and it sets in a truer perspective the entire movement for popular rule. The conclusions which flow from such a comparison can be stated briefly. First, an autocratic government has certain distinct advantages. There is a united will behind it. It has simplicity of structure. Its decisions are prompt and unmistakable. There is no doubt as to the amount and location of authority. There is continuity of personnel and of policy. In the handling of public affairs there is a directness and a freedom of resource which become especially advantageous in the management of foreign relations and the conduct of war.

Autocratic
and popular
government
compared

These are not mere matters of theory. For two decades before 1914 the world was accustomed to marvel at the efficiency of German government, and especially of German administration. In a very large degree, this efficiency arose from the autocratic character of the German imperial and state political systems. The administration of finance, of tariffs, of social insurance, of railways, of the postal service, was carried on through machinery that operated outside the field of influence of party politics, and largely outside the field of popular control; and—in contrast with the United States, where these and other activities are controlled by popular bodies, *i.e.*, Congress and the state legislatures—a remarkable measure of scientific precision was attained.

This, however, is only one side of the story. The advantages

¹ J. Bryce, *Modern Democracies*, I, Chap. IV.

CHAP.
IIIAdvantages
of autocracy
only formal and
technical

enumerated are, in the main, of a formal and technical nature. It is not impossible for them to be attained, at least in a degree which is at present unusual, in governments of a popular type. And they are in practice largely or entirely offset by certain disadvantages which inhere in autocracy, no matter how benevolent the autocrat may be. Government is not a mere matter of cold-blooded, efficient collection of taxes, trying of cases, and enforcing of laws. To achieve its full purpose, it must cultivate the aptitudes and aspirations of the people and give the fullest possible opportunity for their expression. It has a broad human, social, moral function. The fundamental objection to autocracy is that it means government whose will, impulse, and purpose lie outside of the people governed; indeed, its interests and aims are not unlikely to run sharply counter to those of the masses. The prince does not owe his position to the people; he regards himself as the personification of the state; the people are mere subjects; as against his authority they have no rights; the officers are his bureaucrats, not the servants of the community; the laws are his decrees, not expressions of the public will; where there are elective assemblies or other popular agencies, they exist by sufferance of the prince, and their activities are restricted by him as he may choose; the army is a royal tool, not the people's guardian, and militarism almost inevitably becomes the accompaniment of bureaucracy. Under these arrangements, government can hardly be otherwise than arbitrary, oppressive, and unjust; and the modern world, or most of it, has said that it will have no more of them. The mechanical advantages of autocracy are outweighed by its moral shortcomings; and the thing which peoples nowadays must do is to find a way of realizing these advantages under governmental systems based upon principles of liberalism. Movements for efficiency in popular government have already gone far enough to show that the old notion that the best government is a benevolent absolutism is a fallacy.¹

Direct
democracy
v. repre-
sentative
government

Popular government, however, is not always and everywhere the same thing. The essential feature of it is control by the people over the exercise of the powers of sovereignty. But there are at least two principal ways in which this control can be wielded. The first is by keeping the management of affairs actually in the hands of the people themselves, so that the citizens in the mass make the laws, levy the taxes, decide questions of war and peace, determine

¹J. Bryce, *Modern Democracies*, II, Chap. LXXIV, on "Democracy Compared with Other Forms of Government."

all other matters of policy, and select and supervise the officials who carry on those parts of the public business which are of such a nature as to require personal and continuous attention. The alternative to this is the plan of entrusting law-making, formulating policy, and the appointment and supervision of most of the officials to persons chosen by the citizens to exercise these functions in their behalf. In either case we call the government "democratic;" that is to say, it is based on the principle of "the rule of the many," which is what the word democracy means. But according as the one plan or the other is followed, we have (1) direct democracy or (2) representative government.

CHAP.
III

Theoretically, direct democracy is the most perfect of all forms of government; for under it the powers of sovereignty not only are possessed by the people but are actually exercised by them. A moment's reflection, however, will suggest several practical difficulties. In the first place, the system makes large demands upon the citizen's time and energy; he must at all times be prepared to turn aside from his regular pursuits to discharge his duties as legislator, administrator, judge. In the second place, the system assumes that the ordinary citizen is qualified to decide wisely what laws ought to be made and what policies ought to be pursued. But we know that very often even the most experienced public men can reach such decisions only after extended, and perhaps highly technical, investigations. Still other obstacles suggest themselves: the delay involved in bringing the people together to take governmental action; the unfitness of a vast popular concourse to transact business in a sober and orderly manner; and, most obvious of all, the physical impossibility of operating the plan in a state of any considerable size. So weighty are these difficulties that the world has known few direct democracies. Certain of the ancient Greek states were organized on this plan; but they were very small, and only a limited section of their populations was conceived of as belonging to the body politic. Many of the Swiss cantons were once governed in this way; but representative councils have now superseded the *Landsgemeinden*, or primary assemblies, in all except four.¹ The New England towns have, in general, belonged in the same category. But they are small subordinate

Disadvantages of
direct
democracy

¹ More exactly stated, the cantons of Uri and Glarus, the two half-cantons of Unterwalden, and the two half-cantons of Appenzell—in all, six governmental areas. R. C. Brooks, *Government and Politics of Switzerland* (Yonkers, 1918), Chap. xvii. Cf. F. Bonjour, *Real Democracy in Operation; the Example of Switzerland* (New York, 1920).

CHAP.
IIIRise of
the repre-
sentative
principle

areas, not states; besides they, too, are gradually going over to the representative system.

The assertion will hardly be challenged that the greatest discovery ever made in the field of human government is the representative principle; for without that principle popular government in large states could not exist. The ancient world was unacquainted with the representative idea; government was either direct democracy within a petty city state or autocracy over a broad expanse of territory. The idea originated in the Middle Ages and found its first practical applications in arrangements made by the Norman and Angevin kings of England for the assessment of taxes and the administration of justice. In the thirteenth century it became the basis for the organization of the English Parliament, and thereafter it was turned to use in the Estates General of France, the Cortes of Spain, and many other national and local bodies. At the outset, representatives were conceived of as merely spokesmen of their respective "estates," cities, or other constituencies, selected to sit and deliberate with similar spokesmen of other class or geographical interests. As early as the sixteenth century, however, the view arose in England that the members of Parliament were representatives of the people at large, rather than merely of particular classes or places; and this is the basis on which representation commonly rests today, even though in practice the deputy may often be inclined to think of his constituents first and of the general welfare afterwards.

Its ad-
vantages

As a practical plan of political organization, the representative system has large and obvious advantages over direct democracy. Without taking ultimate control from the people, it puts the actual work of government in the hands of persons specially chosen for the purpose—persons who can be paid to give their attention to it undividedly, and who can be expected either to possess from the outset or to acquire the special knowledge and skill requisite to give the best results. The system obviates the necessity of bringing the people together in unwieldy assemblages. It interposes a check upon the action of impulsive majorities. Above all, it opens the way for the development of popular government in any state whatsoever, regardless of extent or population. During the past hundred years it has spread round the world—to Australia and New Zealand, to various parts of Africa, to Latin America, to Japan, China, India, Persia.

The principle is, however, applied in widely varying ways.

Especially are there differences in the basis and breadth of representation and in the literalness and fullness with which the idea is carried out. Thus, in England the device is made use of quite without reserve; the people entrust the most sweeping powers—constituent, legislative, and financial—entirely to Parliament. In the United States the plan does not preclude arrangements under which the people retain, through their party organizations, and especially through the use of the initiative, referendum, and recall, a considerable amount of direct and independent control. The same is true in Switzerland, republican Germany, and several other states. After all allowances are made, the fact remains, however, that even where the machinery of direct democracy exists it is used sparingly, and that, to all intents and purposes, popular government has come to be synonymous with representative government.

OHAP.
IIIDiffering
applications

This does not mean that all men everywhere are satisfied with representative institutions as they now exist. On the contrary, the effectiveness, the capacity for future development, and even the inherent justification of representative government, have of late been sharply challenged in many quarters, particularly in post-war Europe. Some of the criticism is really aimed at the political state as an institution. But, quite apart from that, the representative system itself is under fire. Some find fault with it because of the incompetence of those whom it places in control of public affairs. Some consider that as at present organized it is wrongly based, *i.e.*, on artificial geographical areas rather than on significant functional groups. Others hold that it is perhaps suitable for Englishmen who originated it but is not adapted to universal use. Still others doubt the ultimate feasibility of popular government in any form, and wonder—as did even so sane a political student as Lord Bryce—whether the swing of the centuries will not bring something entirely different in its place. There is no denying that twentieth-century conditions—by no means all of them traceable merely to the World War and its aftermath—subject the representative form of government to some very serious handicaps and strains; nor that, if it is to survive, it will have to show capacity for progressive adaptation along lines some of which still lie beyond the horizon. With all its shortcomings, however, the system prevails today throughout the greater part of the civilized world; the experience of generations has not disproved that it is capable of serving the ordinarily accepted ends of government; no practicable sub-

Criticisms
of repre-
sentative
government

stitute is in sight which promises better things; it not only can be, but is being, readapted and developed (for example, in respect to the representation of minorities) under our very eyes. Unless we are prepared to give up the notion that the people should control the instrumentalities of their government, we are bound to conclude that, so far as we can see ahead, human happiness and well-being are largely dependent upon the effective functioning of our present representative institutions, in our present political state. To discover how these institutions can be sustained, improved, and made to yield us good government—to develop popular rule qualitatively as much as we have extended it quantitatively—is one of the high tasks of our generation.

REFERENCES

- J. W. Garner, *Political Science and Government* (New York, 1928), Chaps. XIII-XVIII.
- W. F. Willoughby, *Government of Modern States* (New York, 1919), Chaps. III-V, VI-VII.
- W. W. Willoughby, *The Nature of the State* (New York, 1896), Chap. XIII.
- and L. Rogers, *Introduction to the Problem of Government* (New York, 1921), Chaps. v-vii, ix.
- R. G. Gettell, *Introduction to Political Science* (Boston, 1910), Chaps. XIII, xv.
- C. G. and B. M. Haines, *Principles and Problems of Government* (rev. ed., New York, 1926), 189-246.
- H. L. McBain, *The Living Constitution* (New York, 1927), Chap. I.
- F. J. Goodnow, *Principles of Constitutional Government* (New York, 1916), Chap. I.
- A. L. Lowell, *The Government of England* (New York, 1909), I, introd. note.
- J. Bryce, "Flexible and Rigid Constitutions," in *Studies in History and Jurisprudence* (New York, 1901), Chap. III.
- , *Modern Democracies* (New York, 1921), I, Chaps. III-IV; II, Chaps. LXXIV, LXXX.
- C. Borgeaud, *Adoption and Amendment of Constitutions in Europe and America* (New York, 1895), Chap. I.
- H. W. Horwill, *The Usages of the American Constitution* (London, 1925).
- J. S. Mill, *Considerations on Representative Government* (London, 1861, and many later editions).
- H. J. Ford, *Representative Government* (New York, 1924).
- H. L. McBain and L. Rogers, *The New Constitutions of Europe* (Garden City, 1922), Chap. I.
- W. B. Munro, *The Invisible Government* (New York, 1928), Chap. II.
- , "The Resurgence of Autocracy," *Foreign Affairs*, V, 605-616 (July, 1927).
- F. A. Ogg, "New Tests of Representative Government," *University of Chicago Record*, XI, 270-279 (Oct., 1925).
- H. R. Spencer, "European Dictatorships," *Amer. Polit. Sci. Rev.*, XXI, 537-551 (Aug., 1927).

CHAPTER IV

THE DISTRIBUTION OF PUBLIC POWERS

When a new state comes into existence or an old one reconstructs its political system, certain fundamental questions have to be met and answered. What powers shall be conferred upon the new government? Who shall have ultimate control over the exercise of these powers? What machinery shall be employed, and on what lines shall the public powers and functions be parcelled out among the several agencies or authorities? We have seen something of the experience of states in meeting the first question, and of the contrasted political forms that arise from different answers to the second. It remains to take note—in this chapter and the one that follows—of the varied structural arrangements through which the ends of political organization are attained.

Except in a very small state, the powers of government are so numerous, complicated, and weighty that they can be carried out only by being entrusted to many different hands. Obviously, this distribution will mainly determine the form which the apparatus of government will take. There are two ways in which it can be made. The state may be divided into one or more sets of districts, and to each district, equipped with the requisite machinery, may be assigned the exercise of certain powers. This is, of course, a *territorial* distribution. Or the division may be in accordance with the nature of the authority exercised, in which case it is functional. It must not be inferred that use of either method precludes use of the other; on the contrary, in practically all states governmental powers are distributed in both ways simultaneously. But the character of a government as a practical working system depends very much upon whether emphasis is placed upon the one principle of distribution or upon the other.

Territorial
and func-
tional dis-
tribution

It must be observed that not every parcelling out of government work by districts or other divisions constitutes a territorial distribution in the sense here meant. For example, the collection of the customs duties, the administration of the immigration laws, the management of the postal service, is carried on in the United

Nature of
territorial
distribu-
tion

States and other countries in customs, immigration, and postal districts. But these areas exist only for administrative convenience; by its very nature the work to be done must be performed locally all over the land rather than at the capital. In all such districts the authority of the central government is exercised in a uniform manner by persons who are officers, not of the district, but of the central government. The powers are undivided, even though the agencies through which they are exercised are scattered over the country.

What we have in mind when we speak of a territorial distribution are, rather, units that are political, not merely administrative; that is, divisions to which are assigned considerable aggregates of governmental power, to be exercised largely or wholly at the discretion of the division (and therefore not uniformly), and through governmental organs which belong to it rather than to the central government. Such divisions are the states, counties, cities, and towns of the United States; the counties, boroughs, and urban and rural districts of England; the departments, arrondissements, and communes of France; the cantons of Switzerland. The reasons for turning over governmental power to subdivisions of these kinds are easy to discern. One object is to relieve the central government of an intolerable burden of work and responsibility. But the main consideration is that many of the tasks of government relate exclusively to particular sections of the country, which will prefer to assume immediate responsibility for them, and can see that they are exercised in accordance with variations of local conditions and needs. It is inherently just that separate communities should have control over their own affairs in so far as the interests of other communities, or of the state as a whole, are not affected adversely; and it may reasonably be expected that such regulation will be wiser and more effective than if exercised by a distant and overworked central government.

The actual structure of a governmental system is determined in no small degree by the method employed in making this territorial distribution of powers. Here again there are two ways of accomplishing the purpose. On the one hand, a scheme of distribution, stipulating what the divisional areas of government shall be and what functions they shall have, may be written into the constitution. In this case the distribution is made by the political sovereign, and the resulting governmental agencies, central and local, are coördinate in the sense that both derive their authority

from direct grant of the sovereign and neither can encroach upon the field occupied by the other unless the sovereign assents. On the other hand, the constitution may go no farther than to create a single organization, endowed with full governmental powers, to which is left the task of providing for such territorial distribution as may be found desirable.

CHAP.
IV

According as the one plan or the other is followed, the resulting form of government is federal or unitary. The distinction arises, not from the mere fact of a territorial distribution of powers, for there is such a distribution in all modern governments, nor yet from the amount or kinds of power delegated to the local areas, but from the authority by which the distribution is made. To be concrete, the government of the United States is federal, because the sovereign people have provided in the constitution equally for the central, national government and for the governments of the principal divisional areas, *i.e.*, the states; it is not at all for the central, national agencies to say what powers or what organization the states shall have. On the other hand, the government of France is unitary, because there is but a single, integral government, with its seat at Paris, a government which has created the departments, arrondissements, and other local political areas for its own purposes, and which is free to alter these subordinate districts in their organization and powers at any time, or even to abolish them altogether.

Federal
and
unitary
govern-
ments

Few subjects have evoked more lively discussion among political scientists than the relative merits of these two forms of governmental organization. The federal system has won high praise from Montesquieu, De Tocqueville, Sidgwick, Bryce, and many other authorities; some writers have gone so far as to pronounce it the best possible basis of human government. Its advantages have been summed up admirably by an American writer as follows:

Advantages
of the
federal
system

"It affords a means of uniting into a powerful state commonwealths more or less diverse in character and having dissimilar institutions, without extinguishing wholly their separate existences. It furnishes the means of maintaining an equilibrium of centrifugal and centripetal forces in a state of widely different tendencies . . . It excels all other forms of government in the effectiveness with which it combines the advantages of national unity and power with those of local autonomy. It secures at the same time all the advantages of uniformity in the regulation of affairs of general concern with those of diversity in the regulation of local affairs. Instead of

concentrating the powers of the state in a single organ or set of organs, as in the case of the unitary state, federalism distributes it between a common central government and a number of local governments, and thus prevents the rise of a single despotism absorbing all political power and menacing the liberties of the people. By securing the advantages of self-government for the people in those affairs which are peculiarly local to them, it reconciles them to the loss of power which they have sustained through the surrender of their control over other affairs to the general government. Furthermore, through the right of local self-government, the interest of the people in local affairs is stimulated and preserved, they are educated in their civic duties, and this in turn reacts upon the character of the local administration. Federalism, observes Bryce, allows experiments in local legislation and administration which could not safely be tried in a large country having a unitary system of government.¹ At the same time it supplies the best means of developing a new and vast country by allowing the particular localities to develop their special needs in the way they think best."²

Federalism
sometimes
the only
practicable
form

All of these considerations have weight. Nevertheless, the federal plan has serious defects, and some authorities refuse to recognize it as more than a makeshift resorted to as a means of attaining a modicum of union when circumstances make it impossible to establish a fully unified governmental system. It is a well-known fact that the United States set up the federal form of government, not because the framers of the constitution coolly weighed the advantages of the federal and unitary forms and chose the federal form as being the better, but because the states then existing could not possibly have been induced to make such a surrender of powers as the establishment of a unitary government would have required. Federalism in Canada, Australia, Germany, and Switzerland is of similar origin; and if in certain of the Latin American states—Brazil, Argentina, and Mexico—it represents a deliberate choice, this choice sprang rather from a natural tendency to imitate the United States than from a free and full study of the alternative systems.

In actual operation the federal plan reveals a number of defects.

¹ A good illustration is the socialistic innovations introduced in North Dakota in 1918-19, when the Nonpartisan League was in control of affairs in that state.

² J. W. Garner, *Introduction to Political Science*, 230-231. Cf. J. Bryce, *American Commonwealth* (4th ed., 1910), I, Chaps. XXVII-XXX.

First, it is very complex. There are as many different sets of officials as there are government areas, resulting in overlapping, confusion, and waste. Second, there is a lack of unity. These sets of officials are coördinate in status; they will not take orders one from another; they are apt to work at cross purposes; they occasionally fall into actual conflict. This division of effort and of responsibility works out disadvantageously both in foreign and in domestic affairs. The United States has been repeatedly embarrassed in its efforts to enforce treaty obligations by legislation enacted by individual states in pursuance of their reserved powers over the rights of person and property. Much, indeed, of our political and economic history turns on the difficulty of securing adequate and uniform regulation of railway rates and services, labor, industrial corporations, taxation, conservation of resources, insurance, marriage and divorce—not to mention the enforcement of prohibition laws—under a governmental system that divides the power of control among more than two score largely independent authorities.

Third, the federal plan is likely to prove excessively rigid. The jurisdictions of the central government and of the several divisional governments are defined in a good deal of detail in the constitution; and the constitution of a federally organized state is usually difficult to amend, for the reason that, as a rule, it is necessary to obtain ratification by a substantial majority of the federated divisions, acting separately. Social and economic changes, however, come so rapidly under modern conditions, and create such novel and critical problems, that promptness and freedom of governmental action are greatly to be desired. A unitary government, being in full command of the field, can proceed at any time to whatever legislative and administrative readjustments are deemed necessary. Probably no constitutional amendment will be required; but if it is, it can usually be adopted expeditiously. On the other hand, a federal government is likely to be obliged to wait until conditions have become almost intolerable before a new grant of authority is forthcoming, if indeed it is obtained at all.

Finally, it is to be observed that whereas it is commonly said that the federal system is the more favorable to local self-government, there is no essential reason why this should be so. As a matter of fact, in a number of instances it is not the case. Thus in England, where the unitary type of government prevails, the local

community enjoys almost, if not quite, as much control over its own affairs as does the local community in most parts of the United States. Although based on a centralization of authority, a unitary government may decentralize the actual exercise of this authority to any extent that the people who live under it find desirable.

Herein we have some of the reasons why federal government is not now as highly regarded as formerly. It is significant that when, in 1909-10, the British colonies in South Africa drew together under a common government they decided, after mature deliberation, to set up a unitary rather than a federal system, although the situation was one which quite as naturally suggested the federal form as did that in Canada in 1867 or that in Australia in 1900. Post-war Europe, in making numerous new constitutions, showed little liking for federalism. Yugoslavia and Czechoslovakia, although adapted by historical and cultural conditions for federal organization, chose unitary systems; and the German and Austrian republics, although ostensibly federal, are found upon closer examination not to be completely so. A further evidence of increasing appreciation of the advantages of the unitary type is the tendency in all federally governed states—nowhere more than in the United States—to exalt the central government at the expense of the divisional governments by increases of power, both through formal constitutional amendments and through interpretation and usage.¹

Whatever its structure, a government has varied functions and wields powers of different kinds. More than two thousand years ago Aristotle developed the idea that a government should contain three organs, one "deliberative" (or legislative), another executive, and a third judicial.² The concept was imperfectly worked out, and during mediæval and early modern times it was largely lost to view. Near the close of the seventeenth century, however, the English philosopher Locke made the "separation of powers" a cardinal feature of his system;³ Montesquieu, in France, put great stress upon it a half-century later;⁴ during the American

¹ For this development in the United States see Chaps. XIII, XXIX.

² *Politics*, Bk. IV, Chap. xiv.

³ *Two Treatises of Government*, ed. by W. S. Carpenter (New York, 1924), Bk. II, Chap. xii.

⁴ In his *De l'esprit des lois* (Bk. XI, Chaps. iv-vi) we read: "Political liberty is to be found only in moderate governments; even in these it is not always found. It is there only when there is no abuse of power. . . . To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. . . . In every government there are three

and French revolutions it gained wide currency; and it is still one of the most familiar of political principles, even though less influential than at an earlier day. The three-fold classification which Aristotle suggested, *i.e.*, legislative, executive, and judicial, still meets with widest acceptance; and it will be employed for purposes of this book. It should be noted, however, that certain important French and American writers follow Thomas Paine, and even Montesquieu himself, in holding that the judiciary is not in its essence distinct from, but is merely one aspect of, the executive power;¹ also that an able American writer has developed an ingenious, although not wholly convincing, classification which adds to the traditional three functions two others, *i.e.*, electoral and administrative.²

CHAP.
IV

The legislative function is, obviously, that of ascertaining the will of the sovereign authority and expressing it in the form of laws. The judicial function is, in the main, that of hearing and deciding disputes which arise out of the enforcement of these laws. The executive function is that of representing the government as a whole (especially in its dealings with other governments) and of seeing that the laws are duly enforced. If an administrative function is to be distinguished from the others—and there are good reasons for doing so—it is that of actually carrying out the provisions of the laws as declared by the legislature and interpreted by the judiciary; the executive function involving supreme oversight and the exercise of considerable policy-determining power, the administrative function comprising, rather, the detailed, continuous, and largely routine business of law enforcement at first hand. There is, however, no sharp line of demarcation between the two.

Three main
functions

This differentiation of governmental actions affords the basis for the second principal mode of distributing governmental powers, namely, in accordance with function. Nothing is more natural than to put the exercise of different kinds of power in the hands of different organs of government, and in every government there is a certain amount of such distribution, just as there is of neces-

Reasons
for func-
tional dis-
tribution

sorts of power: the legislative, the executive . . . and the judicial power. . . . When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. . . . Again, there is no liberty if the judicial power be not separated from the legislative and executive.”

¹ L. Duguit, *La séparation des pouvoirs*, 73-74; F. J. Goodnow, *Principles of Administrative Law*, 17-19.

² W. F. Willoughby, *Government of Modern States*, Chap. xi.

sity a certain amount of distribution on a geographical basis. One reason for a functional distribution is practical convenience. The tasks of government are so numerous and onerous that they must be divided among many hands. A second object is the security of the public interests. No single governmental organ or group of organs, it is urged, should be endowed with so much power that it can become tyrannical; powers must be distributed among various agencies, which can be set to watch and check each other.

Both of these considerations weighed with the makers of our American constitutions. Acting in the light of their own experience, and strongly influenced by the teachings of Locke, Montesquieu, and other European writers on government, they worked out both state and national governmental systems whose basic principle was, and still is, the separation of executive, legislative, and judicial powers. The authors of these new organic laws had no desire, however, to put any branch of government in a position of such independence that it could usurp authority or disturb the equilibrium. Hence they interposed a series of checks and balances which caused the executive branch to become partly legislative and the legislative branch partly executive; while they made no express provision for an administrative branch at all. The curious result is that the governments of the United States and the several states, although in law governments of separated powers, operate in reality rather less in accordance with that principle than do certain foreign governments which are organized legally on the plan of "union of powers" rather than that of separation.¹

REFERENCES

The Federalist, Nos. XV-XVII, XLVII-LI.

J. W. Garner, *Political Science and Government* (New York, 1928), Chaps. XIV, XVI.

W. F. Willoughby, *Government of Modern States* (New York, 1919), Chaps. X-XI.

W. W. Willoughby, *The Nature of the State* (New York, 1896), Chap. x.

——— and L. Rogers, *Introduction to the Problems of Government* (New York, 1921), Chap. XXIV.

J. Q. Dealey, *The State and Government* (New York, 1921), Chaps. X-XI.

C. G. and B. M. Haines, *Principles and Problems of Government* (rev. ed., New York, 1926), 247-279.

R. G. Gettell, *Introduction to Political Science* (Boston, 1910), Chap. XIV.

F. J. Goodnow, *Principles of Administrative Law* (New York, 1905), Bk. I, Chaps. I-IV.

¹ W. F. Willoughby, *Government of Modern States*, 236-267.

- S. Leacock, *Elements of Political Science* (Boston, 1907), 141-153, 233-257. CHAP.
 A. B. Hart, *Introduction to the Study of Federal Government* (Boston, 1891), IV
 Chap. I.
 W. Bondy, "The Separation of Governmental Powers," *Columbia Univ. Studies*
in Hist., Econ., and Pub. Law, V, No. 2 (New York, 1896).
 B. N. Cardozo, *The Nature of the Judicial Process* (New Haven, 1922).

CHAPTER V

THE STRUCTURE OF GOVERNMENT

Structure
of govern-
ment influ-
enced by
distribu-
tion of
powers

The machinery employed in carrying on the work of a government is determined in part by the manner in which public powers are distributed geographically; a government organized on a federal basis naturally calls for mechanical arrangements different from those that are needed under a unitary system. But the structure of a government is influenced in an equally important way—indeed, rather more decisively—by the distribution of powers functionally. Among the first questions to arise when one begins to inquire into the governmental system of a country are: Who has the power of making laws? Who is charged with executing these laws? What is the system of courts? What are the agencies of administration, and how are they linked up and controlled?

The legis-
lature

It is generally recognized that the most important branch of a government, especially in these days of political democracy, is the legislature. It would be so even if the legislature were only, as the name implies, a law-making agency. In point of fact, however, a modern legislature is invariably a good deal more than merely a machine for grinding out statutes. In most countries, including our own, it has an important rôle in amending the constitution; in Britain, indeed, as we have seen, Parliament's power to make changes in the fundamental law is legally unlimited. It may serve as an electoral authority, as do the American House of Representatives and Senate, respectively, in case the electoral college fails to choose a president or vice-president. It may act as, in effect, an executive council, as does our Senate in relation to treaties and appointments. It often has judicial functions, as for example in the case of the British House of Lords. And in all cabinet-governed countries (and to some extent in others) it serves as a sort of board of directors, guiding the executive and administrative authorities in their work and holding them to a more or less strict accountability for it.

Variety of
functions

Law-
making

The main business of a legislature is, nevertheless, to make laws. Not that all law is made in this fashion, or that all measures passed

by legislative process are to be considered as of the nature of law. It would surprise the inexperienced inquirer to learn how large a part of the law operating in Great Britain, the United States, and other countries was never created by any act of formal legislation; also, how small a proportion of the measures that emanate from such legislative bodies as our Congress and our state legislatures are, properly speaking, laws. Much law arises from custom and from judicial decisions; many so-called legislative acts, at all events in America, relate nowadays to details of administration, and, being particular rather than general, temporary rather than permanent, are in the nature of administrative orders rather than laws. Of true legislation, however, there is, of course, a considerable amount; and while in steadily increasing degree, especially in the English-speaking and cabinet-governed countries, the initiative lies with the executive and administrative authorities, the ultimate power and responsibility of decision rests with the legislative branch.

In structure, as in function, legislatures vary widely. Inasmuch as it is peculiarly the legislature's province to voice and give effect to the public will, a question that must be given the most careful consideration by constitution-makers is, What kind of legislative branch will insure the fullest and truest representation of the people as a whole consistent with deliberate, expeditious, and honest performance of the work in hand? The general question resolves itself into several particular queries. Shall the legislature consist of one house or of two houses? How large shall the membership be? How shall the members be apportioned? How shall they be elected? What shall be their qualifications? How long shall they serve without re-election? How much, if anything, shall they be paid? How shall the legislature be organized for work?

The wide variations of practice in these matters cannot be described here, even in summary. The arrangements existing in the United States, in both national and state governments, will be duly considered in later chapters, and comparisons will be made with arrangements in other countries.¹ Suffice it to say that legislatures are usually bicameral, *i.e.*, organized in two houses, which in American countries are commonly coördinate in power but in Europe are no longer so; that it is usually thought best to put the two houses upon sufficiently different bases to prevent them from being mere duplicates of one another; that, while the composition of so-called "upper" chambers is dominated by no single principle,

CHAP.

V

Questions
of struc-
tureCommonest
structural
arrange-
ments

¹See Chaps. XXI, XXXV, XLVI.

lower chambers are almost invariably made up of representatives chosen directly by the electorate; that through the broadening of the suffrage the lower branch has steadily become more truly popular; that, largely on this account, most legislative bodies have increased in size to the point of unwieldiness; that members of the lower house are most frequently chosen in single-member constituencies in English-speaking countries but in multiple-member constituencies, with proportional representation, in Continental Europe; that property, religious, and other special qualifications for election have been so reduced that practically all voters are eligible; that payment of salaries to members, once unusual, has now become the accepted practice; that legislatures are elected for fixed terms, yet in many countries are subject to dissolution at any time by decision of the executive authority; and, finally, that with few exceptions the form of organization of legislative bodies for the carrying on of their work is left to be determined by each chamber for itself.

The
executive
branch:
chief
functions

The newer tendency to recognize an administrative branch of government as distinct from the executive branch has at least the advantage of reducing the executive to very simple scope and form. So considered, the executive functions are, while highly important, few in number and substantially the same in all governments; and for their performance hardly any organs or agencies are required beyond the single office of chief executive. The necessary and usual executive functions may be enumerated as follows: (1) to represent the state, as titular head, in its dealings with other states; (2) to appoint to and remove from important civil and military offices; (3) to exercise supreme command of the armed forces; (4) to grant pardons and reprieves; and (5) to see that the laws of the land are fully and impartially enforced. It almost invariably happens that the chief executive does other things besides these; indeed, the last-mentioned function obviously involves powers of inspection and direction which bring the executive into close relation with administration. Of purely executive functions, however, there are hardly any others.

Single
and plural
executives

The main questions that arise, therefore, when the framers of a constitution take up the executive branch are: Shall the chief executive be single or plural? What shall be the basis and period of tenure? And what relations shall be sustained with the other branches of the government? In general, the single executive has commended itself as preferable to the plural. It is to be observed,

however, that in England and other cabinet-governed countries, while there is an individual (king or president) who is titular executive, the actual working executive is, rather, the group of persons forming the cabinet; also that Switzerland, while having a president, has as its actual executive a "federal council," composed of seven members, among whom the president is only *primus inter pares*. The formal, or legal, executive (which excludes cabinets) may be either hereditary or elective. The hereditary type is not without advantages. It makes for continuity and unity in the execution of public policy; it tends to bring to the office a succession of persons specially trained for it; it obviates disturbing, and sometimes tumultuous, elections. On the other hand, there is the grave disadvantage that there can be no guarantee that the hereditary executive will be competent; and since, furthermore, an hereditary executive necessarily involves a monarchical form of government, the type can no longer be expected to meet with much favor, except, at all events, where the monarch is, as in England, only the nominal, not the real, executive.

CHAP.
VHereditary
and
elective
executives

For the election of chief magistrates three main plans have been devised, according as the choice is made directly by the electorate, by the legislature, or by a special electoral college. As a matter of law, the first plan is now hardly found outside of the German republic and the Latin American countries. France tried it in 1848, but with unhappy results,¹ and the view is widely held, not only that the people as a whole cannot be trusted to make a wise choice, but that popular election opens the door for dictatorships and other abuses. The second plan, namely, election by the legislature, prevails today in France, in Switzerland, in Austria, and in several other countries. The third, *i.e.*, choice by a select body of "electors," themselves chosen by the people, is, in form, the method employed in the United States, although the unanticipated development of party machinery and discipline has brought it about that our presidential electors merely register the will of the voters who have chosen them, so that for all practical purposes the plan of popular election prevails.

Modes of
electing
the
executive

The relations existing between the executive and the other branches of government involve numerous questions that cannot be taken up here. Fundamentally, they hinge on the distinction be-

"Presiden-
tial" v.
"cabinet"
government

¹ By deft use of the "plébiscite" Louis Napoleon first secured election as president of the Second Republic and later obtained a ratification of the *coup d'état* by which he converted the country into an empire.

tween "presidential government" and "cabinet government." In a presidential government the chief executive derives his powers directly from, and is immediately responsible to, the electorate. He is not chosen by the legislature; he holds his office for a fixed term, regardless of whether his relations with the legislature are harmonious or otherwise; he stands on a common footing with the legislature, and in most of his acts cannot be controlled by it. Such is the system which we have in the United States. On the other hand, in a cabinet government the titular executive counts for little and the actual, working executive, *i.e.*, the cabinet, while not elected by the legislature, is composed of persons who are members of that body, who are indeed its leaders, who retain office only so long as they can collectively command the legislature's support (at all events, the support of the majority in the lower house), who accordingly form a sort of executive committee of that body and are responsible directly to it, rather than to the electorate, for all of their acts. This is the type of executive found, with some variations, in England, France,¹ and most other European countries.

It is obvious that the presidential system is based upon the idea of a rather complete separation of executive from legislative powers, even though, as is true in the United States, the executive and legislative authorities may be planned to check one another at important points. Under a cabinet system there may be also, as there is in England, full recognition of the distinction between executive and legislative functions. Functions of both kinds are, however, entrusted to the same hands; and relations between the two branches of government become exceedingly close. The cabinet system has the obvious advantage of unity, and also responsiveness to the public will, since in the event of serious disagreement a parliamentary dissolution, followed by a general election, takes place without the necessity of awaiting the expiration of anybody's "term." The relative desirability of the two types is, however, not a matter for generalization, but is rather a question to be answered entirely with reference to the conditions existing in the particular case.

A principal function of the executive branch is, as has been stated, to see that the laws are duly enforced. Distinguishable from this function is the work of actually enforcing these laws and

¹ France, indeed, has a president; but her governmental system is of the cabinet type. F. A. Ogg, *Governments of Europe* (rev. ed., 1920), Chap. xxii.

of carrying on, in general, the routine business of the government—in other words, what we call administration. It is not yet customary to maintain a distinct branch of government for administrative purposes. None the less, there is a tendency toward this policy, notably in France, Italy, and other European countries; and the Latin American republic of Uruguay, in a new constitution adopted in 1917, deliberately withdrew the administration of internal affairs from the executive and vested it in a separate national council of administration. Without implying that a real administrative “branch” is to be found in all governments, we may nevertheless make a place for such a feature in our outline of governmental machinery. Even where, as in the United States, no clear line can be drawn between executive and administrative functions and agencies, a broad distinction can still be perceived.

The problems presented by the administrative part of a government have been arranged by a leading American student of administration in four groups, according as they relate to organization, personnel, *matériel* (or equipment), and practice and procedure.¹ The foremost question of organization is whether the long and growing list of distinct administrative services—tax collection, bank inspection, forestry, immigration, the post-office, public health, and what not—shall be organized on an essentially independent and coördinate basis or whether they shall be grouped in a few main departments. In general, our states have followed the former plan, and our national government the latter. Another question of organization is whether there shall be set up some central coördinating and controlling agency, such as the Treasury in Great Britain, or the Budget Bureau in the United States. Problems of personnel are even more numerous and important. How shall the officers and employees in the several services be recruited? Shall they be subjected to competitive tests, and if so, of what nature? What opportunities shall be offered them for promotion? How shall their efficiency be measured and recorded? How shall they be instructed and disciplined? Under what conditions shall they be retired?

The conduct of the public business requires the maintenance and upkeep of gigantic physical plants and the purchase and distribution of vast quantities of supplies. This raises still another important group of problems—the problems of *matériel*, or equipment. Shall government property be cared for and equipment be

CHAP.
VProblems
of admin-
istration:1. Organi-
zation2. Per-
sonnel3. Equip-
ment

¹ W. F. Willoughby, *Government of Modern States*, 391.

procured by the men who are engaged in administration proper or by specially organized "supply services"? Shall each branch of administration have its own supply service, or shall the purchasing and handling of materials be carried on through a central supply department? To what extent shall the government manufacture its own equipment? Finally, there are the problems of business practice and procedure—the preparation of reports, the keeping of records, the filing of correspondence, and, above all, accounting and auditing—which can no more be neglected by an orderly and efficient government than by a well-managed bank, mercantile house, or other private establishment.

A highly important branch of every completely developed governmental system is the judiciary. In a general way, it may be said that the function of the courts is to hear and decide disputes, whether between individuals, or between individuals and corporations or other groups, or between individuals or corporations and the state as represented by the government. This work of deciding disputes involves, or may involve, far more than appears on the surface. First, the facts in any given controversy must be determined. Speaking broadly, the court does not seek out the facts for itself. It leaves this to the parties to the case, who, ordinarily through attorneys, bring forward witnesses and in other ways seek to get before the court a body of evidence showing that the facts are as they, the respective parties, contend. Next, the law must be applied to the facts as ascertained. The result is a judgment in favor of one of the contestants—a decision which, it should be emphasized, must be determined, not by the court's feeling as to what would be the ideal disposition of the case, but in strict accord with the law upon the given subject.

Suppose, however, there is doubt as to what the law is, or that the case presents features that are not clearly covered in the law, or that two or more laws emanating from different authorities are in conflict upon the subject. The court must decide; and here is where the most important function of courts arises, namely, the duty of determining what the law is, what its scope and meaning are, and, when there is a conflict between provisions in the same law or between different laws, which shall prevail. A decision of this sort, once made, is likely to have great weight on later occasions and with other tribunals; and it is easily possible to hold, as many jurists do, that the courts in effect "make" laws, even in a country such as our own in which the principle of separation

of powers would seem to forbid. Nowhere, indeed, as will be explained, has this power of the courts to declare the law been carried to greater lengths than in the United States.¹

Structurally, the judicial branch of a government consists of tribunals known as courts, composed of one or more judges, equipped with the requisite staff of clerks and other subordinates, and all more or less closely articulated in a single system. There must, in the nature of things, be tribunals of different grades or ranks. To take care of petty cases, and to bring the agencies of justice within the easy access of all, inferior courts, with limited jurisdictions, must be set up in the local communities. Superior courts, for the trial of cases of serious crimes or involving important controversies, must also be provided; and it is both customary and desirable to arrange that decisions in the lower courts may, on appeal, be reviewed in the higher ones, in order that errors may be corrected and that greater uniformity in the application of the law may be attained. Most states, furthermore, have a supreme court, with broad and final appellate jurisdiction, and usually with original jurisdiction in certain kinds of cases.

A question that inevitably arises when a judicial system is to be created is, Shall one set of courts be established to handle all classes of cases, or shall different sets be provided for different classes? The nearest approach to a single set of tribunals for the handling of all kinds of cases is in England, where an older and complicated judicial system was much simplified by legislation of some fifty years ago. On the other hand, France, Germany, and other Continental countries maintain a set of "ordinary" courts for the handling of cases that do not involve the validity of governmental actions and a separate set of "administrative" courts for the consideration of cases between individuals and administrative officials of the government; although each of these systems is highly integrated and is exclusive within its field. The tendency in the United States has been toward a considerable degree of differentiation. We have civil courts and criminal courts, courts of equity and courts of common law, probate courts, admiralty courts, domestic relations and divorce courts, morals courts. When it is observed, further, that the United States, on account of the federal character of its government, is practically compelled to have two entirely separate sets of tribunals, one national and the other state—indeed, one national system and forty-eight state systems,

CHAP.
V

The
pyramid
of courts

Different
sets of
courts

¹See Chap. XXIV.

taking no account of the territorial courts—it hardly needs to be remarked that our judicial organization is exceptionally, if not excessively, complex.¹

The one most necessary condition of a satisfactory judiciary is independence. In the last analysis, it is to the courts that every person must look for protection of his rights, whether as against individuals or corporations or as against the government itself; and it goes without saying that his interests will be in a precarious position if the judges are in danger of being dominated by other government authorities or intimidated by public demand or threat. How such independence can be secured that judges will be able to act without thought of consequences to themselves is a matter that has stirred a great deal of discussion. The problem is to throw around them as substantial safeguards as possible, without, however, putting them in a position of complete irresponsibility. On the whole, the experience of different peoples indicates rather clearly that the best results will be attained where the judges (a) are appointed, rather than elected, and without regard for party affiliations, (b) hold office during good behavior, (c) are not subject to removal by the executive, (d) can be removed only for misconduct, and by impeachment or on joint address, *i.e.*, petition, of the two houses of the legislature, and (e) are guaranteed against any reduction of their salaries during their tenure of office. These principles were first worked out in England, where they have been closely adhered to since the end of the seventeenth century. As we shall see, they are applied with good effect in our own federal judiciary, although they prevail to only a limited extent in the judicial establishments of the states.

Some people nowadays regard the electorate, *i.e.*, the body of voters, as forming also a branch of government. "The powers of the electorate," says one writer, "are as truly governmental as are the powers of the usual three departments. Through the suffrage it exercises the executive power of appointment and may compel resignations through the recall; through the use of the initiative and referendum it may exercise large and important lawmaking powers; and by its right of jury service it aids the judiciary in the settlement of civil and criminal cases."² Obviously, the electorate cannot be considered a part of a government without a somewhat drastic reconstruction of our conception of what a government is;

¹ See Chaps. XXIV, XLI.

² J. Q. Dealey, *The State and Government*, 171. Cf. W. F. Willoughby, *Government of Modern States*, Chap. XII.

and it is doubtful whether the change would be in the interest of clearness or truth. In all popularly-governed states, however,—and this includes the great majority of modern states,—the people (more accurately, the voters) indisputably form the basis upon which the government rests; and without confusing matters by labelling the electorate a branch of the government itself, we may very properly take some note of what the electorate is and of the position that it occupies in the political system.

The electorate may be defined as that portion of the whole body of inhabitants of a state which is entitled to vote on political matters. To vote is to give expression to one's individual will, and electoral systems are devised to make possible a simultaneous expression of individual wills, with a view to arrival at a consensus, or at all events a majority view. However wide the suffrage, the electorate can never include the whole mass of the people; and it becomes important to observe what the relation is between these two groups. As has been pointed out elsewhere, sovereignty ultimately rests in the people as a whole. The people in the mass cannot, however, actually exercise sovereign powers; they cannot, even in the mass, delegate this exercise of powers, or indeed act in any manner whatsoever; for a considerable proportion—children, for example—are incapable of participating in political action. What happens, therefore, is that, by one means or another, some part of the people which is presumably most capable politically acquires the exclusive power to exercise the electoral function, and therefore to control the course of the government. This part of the whole population, whether large or small, is the electorate; and it becomes the actual, legal sovereign. It, and not the people as a whole, makes and amends constitutions, elects parliaments and congresses, chooses executive officers, and in some instances proposes, and even enacts, laws.

In the operation of a political system hardly any question can arise of more importance than the composition of the electorate. Not all of the people can be included. What classes shall be excluded, on what grounds, and by what authority? It was a tenet of the French political philosophy of the eighteenth century that every citizen has a natural and inherent right to take part in the choice of representatives for political purposes. The framers of French constitutions, however, have never undertaken to apply this principle literally, and nowadays it is commonly agreed among political scientists that the suffrage is not a right, but rather a

CHAP.
VThe
electorate
and the
"people"Compo-
sition of
the elec-
torate

CHAP.
VMany
disqualifi-
cations
removed

privilege; which means that the scope of the electorate is a question of practical expediency only. Certain classes are obviously unfit to be included: children, persons of unsound mind, criminals, uncivilized or semi-civilized inhabitants. Beyond this there is room for the widest differences of opinion; and every student of modern history knows something of the heated controversies that have raged over the question. Many tests for voting have been employed, based upon residence, age, sex, race or color, citizenship, property-holding, tax-assessment, education, religious belief, occupational or legal status. The trend of modern political development has been, however, pronouncedly in the direction of fewer tests, a more liberal suffrage, and therefore a larger electorate. Qualifications based on race, color, religion, and occupation practically disappeared long ago. Property-holding and tax-paying requirements have of late been widely given up. Educational qualifications are employed in many of our American states, but are hardly known elsewhere. The voting age has been fixed almost everywhere at twenty or twenty-one; and within the past ten or fifteen years the disqualification of women as such has been partially or wholly removed in many lands. Under fresh impetus supplied by the Great War, the world seems to be fast approaching the point where it can be said that, by and large, all adult men and women who are in good standing as citizens are at least potential voters.

Plural
voting

The question of who shall be permitted to vote is, however, only one of the many problems connected with the electorate. Shall each member of the electorate have but one vote? Or shall some members have two or more votes? "Plural voting," in very limited form, still prevails in Great Britain. But elsewhere the rule of "one person one vote" is followed. Again, shall voting be purely voluntary, or shall it be made compulsory? In Czechoslovakia, Belgium, New Zealand, Tasmania, certain Swiss cantons, and four or five Latin American states electors are required, under penalty, to present themselves at the polls unless they can give a valid excuse. Notwithstanding, however, the habitual failure of large numbers of electors in all lands to avail themselves of their privileges, the plan of compulsory voting has not found general favor.

Methods
of voting

Still other questions relating to electoral procedure readily suggest themselves. How shall it be known whether persons who lay claim to the privilege of voting have the necessary qualifica-

tions? It would be theoretically possible to have each elector establish his qualifications whenever he tenders his vote. But this would involve intolerable confusion and delay, and hence states regularly employ some kind of registration system which enables the electoral lists to be prepared with due deliberation in advance and to be kept up to date by periodic revisions. Another urgent question pertains to the physical arrangements under which the votes of the electors shall be cast. There was a time when the voters simply presented themselves before the proper authorities and announced their votes orally and publicly. This system offered limitless opportunity for bribery and intimidation; and although it persisted in Prussia and some other places until the political reconstruction following the World War, most states during the second half of the nineteenth century adopted some form of written vote. For a time the ballot was, however, only theoretically secret; for the ballot papers were furnished by the candidates or their friends; they were usually of such size, color, shape, or texture that, even when folded, they could be distinguished by the officials and bystanders; and they were circulated some days in advance of the election, and in many cases were marked before the voter went to the polls at all. The Australian ballot system, which came into general use in the United States and elsewhere in the last two decades of the nineteenth century, largely remedied these defects. Under it the government furnishes the ballot papers; these papers are uniform in all respects; they are given the voter only when he appears at the polls; and they must be marked in the secrecy of a voting booth.

Finally may be mentioned, without attempt at discussion, such highly important questions as: (1) Shall elections of members of legislative bodies be by simple plurality in single-member districts, or by some method designed to bring about a majority for one of the candidates in such a district, or by one of the many ingenious forms of proportional representation, involving multiple-member districts and allotment of seats in accordance with the number of votes polled by the several party lists? (2) What restrictions, if any, shall be imposed upon candidates and their supporters in carrying on campaigns, especially as to the expenditure of money? (3) How shall the purity of elections be maintained, as against practices, *e.g.*, the purchase of votes, that are inherently wrong, and also practices, *e.g.*, (in Britain) conveying voters to the polls in hired carriages, which, while not involving moral turpitude,

are sufficiently undesirable to have been brought within the scope of prohibitory legislation? (4) How are the votes to be counted, tabulated, reported, and recorded? (5) How, and by whom, are disputes as to the outcome of an election in a given constituency to be decided? Even this by no means exhausts the list of problems with which any electoral system, the world over, fairly bristles. On no one of the matters mentioned is there consensus of opinion, or uniformity of practice. Continental Europe has largely gone over to the proportional plan, but the English-speaking countries, including the United States, have not. On the other hand, English-speaking countries rather rigorously limit the expenditure of money by candidates, and also maintain extensive corrupt and illegal practices acts, but Continental states do not. The ballots, after leaving the voters' hands, are assembled and counted in widely different ways. Britain has one method of settling contested elections; the United States has another; Germany has still a third. When analyzing American electoral organization and procedure in later chapters, we shall find some of these varied practices and points of view exceedingly illuminating.

REFERENCES

- J. W. Garner, *Political Science and Government* (New York, 1928), Chaps. XIX-XXIV.
 W. F. Willoughby, *Government of Modern States* (New York, 1919), Chaps. XII-XVI.
 W. W. Willoughby and L. Rogers, *Introduction to the Problem of Government* (New York, 1921), Chaps. X-XIV, XXI.
 C. G. and B. M. Haines, *Principles and Problems of Government* (rev. ed., New York, 1926), 280-302.
 J. Q. Dealey, *The State and Government* (New York, 1921), Chaps. XII-XV, XVIII.
 L. H. Holt, *The Elementary Principles of Modern Government* (New York, 1923), Chaps. III-VII.
 R. G. Gettell, *Introduction to Political Science* (Boston, 1910), Chaps. XVI-XX.
 S. Leacock, *Elements of Political Science* (Boston, 1907), 154-232.
 F. J. Goodnow, *Principles of Constitutional Government* (New York, 1916), Chaps. VIII-XV.
 H. Sidgwick, *Elements of Politics* (2nd ed., London, 1897), Chaps. XX-XXIV.
 W. E. H. Lecky, *Democracy and Liberty* (New York, 1896), I, Chaps. I, III-IV, X.
 R. Luce, *Congress—an Explanation* (Cambridge, 1927), Chap. iv. Excellent comparison of cabinet and presidential forms of government.
 A. V. Dicey, "A Comparison between Cabinet and Presidential Government," *Nineteenth Century*, LXXXV, 25-42 (Jan., 1919).
 W. Wilson, *Congressional Government* (Boston, 1885).

CHAPTER VI

PRIVATE RIGHTS

Living under government does not mean complete surrender of individuality and freedom. The essence of government is, of course, regulation; and regulation undoubtedly means restraint. But even the most absolute of governments does not undertake to deprive those subject to them of all personal, or private, rights, and a main characteristic of modern constitutional governments is the liberality with which such rights are recognized, and not merely recognized but given protection equal to that given to the rights and powers of the government itself. There are, of course, different ways of surrounding private rights with the requisite guarantees. The American method is to enumerate them at length in the written fundamental law. Our national constitution and most of the state constitutions contain either formal "bills of rights" or articles of an equivalent character, the object being to place the rights or liberties enumerated beyond the power of the government to curtail. Theoretically, there is advantage in this. Practically, however, there is some disadvantage, because changing conditions require that in the interest of justice private rights shall from time to time be freshly defined. At all events, new qualifications and limitations must occasionally be imposed. This readjustment can be made, of course, by amending the constitution. But amendments are usually difficult to obtain, and rights once conceded in a constitution are extremely difficult to withdraw. "It is now the best legal opinion in the United States," says a leading authority, "that, not only has the statement of these [private] rights, in the absolute form in which they appear in the federal and state constitutions, led to an enormous amount of litigation, but that the hands of the government have been seriously tied in its efforts to introduce legal and social reforms urgently demanded by the people themselves. So serious is the situation that it is almost impossible to enact any important social legislation without having its legal validity immediately challenged in the courts."¹

Modes of
guarantee-
ing private
rights:

1. Specific
enumeration in a
written
constitution

¹ W. F. Willoughby, *Government of Modern States*, 153.

CHAP.
VI2. Broad
guarantee
in a writ-
ten consti-
tution

A second plan, for which much can be said, is to put into the constitution a broad guarantee of private rights, while at the same time endowing the government with power to introduce such definitions and restrictions as experience shows to be desirable. This is the method of Switzerland, of Japan, and of some other states. Thus the Swiss constitution, instead of making a flat grant of freedom of the press, says that "the freedom of the press is guaranteed; nevertheless the cantons, by law, may enact measures necessary for the suppression of abuses."¹

3. Reli-
ance on
tradition

Great Britain, France, and some other states follow, however, a still different method. They make little or no attempt to define private rights in any constitutional document. It is true that certain rights of Englishmen are solemnly guaranteed in such instruments as the Habeas Corpus Act and the Toleration Act. These measures, however, are only statutes, and can be repealed or altered at the discretion of the authority that originally enacted them, namely, Parliament. In other words, the British Parliament is no more subject to legal limitations in dealing with individual rights than in dealing with anything else. It is true, also, that some of the best French constitutional lawyers hold that the "rights of man" enumerated in the Declaration of Rights of 1789, although not mentioned in the constitutional laws of 1875, have full force and sanction today.² But even if this be conceded, it must still be recognized that the National Assembly, composed of the senators and deputies, have power, by amending the republic's fundamental law, to make any change in the status of the individual that they desire.³ So far as the law goes, therefore, a citizen of Great Britain or of France has no protection at all against the government under which he lives; the state which stands back of this government has not seen fit to impose definite restrictions upon it in the manner with which we are familiar in the United States. The reason why it has not done so, however, is that such restrictions have not been found necessary. Practical experience is that, even on the existing basis, private rights are no less scrupulously respected than elsewhere. What effectively guarantees them is the traditions of enlightened and liberal government, coupled with the responsiveness of the public authorities to the national will. If these guarantees had proved insufficient, others would have been provided before now.

¹ Art. LV.² L. Duguit, *Traité de droit constitutionnel*, II, 13.³ F. A. Ogg, *Governments of Europe* (rev. ed., 1920), 383-386.

Political philosophers and the makers of constitutions and of political programs have from time immemorial busied themselves with drawing up lists of human rights. During the Puritan Revolution in England the "natural" rights of men were commonly represented as being life, liberty, and property. The American Declaration of Independence asserted that among the "inalienable" rights with which the Creator has endowed men are life, liberty, and the pursuit of happiness. The French Declaration of 1789 named as the "natural and imprescriptible" rights of man liberty, property, security, and resistance to oppression. There is, perhaps, no subject on which more theorizing has been done; and the ramifications of the ideas that have been advanced on "natural," "ethical," and "moral" rights are endless. Happily, we are concerned here only with legal, *i.e.*, enforceable rights—the rights which each state, at bottom, fixes for and guarantees to its own citizens.

Human desires and aspirations are largely the same everywhere, and in the more advanced states today legal rights, however, different in degree, are not very dissimilar in kind. They can be classified in various ways, but perhaps the most fundamental distinction is that between (a) substantive rights and (b) procedural rights. Substantive rights arise from positive immunities from restraint; procedural rights arise, rather, from restrictions upon the manner in which restraint can be lawfully exercised. Substantive rights are of many kinds, but can be thrown into four main classes. The first class comprises civil rights, pertaining to person and property. Familiar examples are freedom of speech, immunity from arbitrary arrest and imprisonment, ownership and free disposal of property, and guaranty against the taking away of property without just compensation. The second group relates to religious freedom, and includes exemption from restraint in the expression of religious opinions and in forms and modes of worship. The third group is political, and usually includes the right of peaceable assembly, the right of petition, and the right to seek and hold office—in short, the right to influence the policies of the government and to aid in carrying these policies into effect. It should be observed, however, that political rights are not shared by all citizens—men, women, and children—in the manner of civil and religious rights. A fourth group of rights may be said to consist of individual liberties in general, as distinguished from the more specific immunities from control of the person—"exemption,"

CHAP.
VIKinds of
rightsClasses of
legal
rights:1. Substan-
tive rights

as Lord Bryce puts it, "from control in matters which do not so plainly affect the welfare of the whole community as to render control necessary."¹ An example is the right of a man to paint his house any color that he likes, regardless of the esthetic ideas of his neighbors; another is his right to neglect his business, even to the point of falling into bankruptcy.

Rights of a procedural nature are designed to protect persons against the government's exercise of powers—themselves entirely legal—in an arbitrary or unjust manner. These rights have been more extensively recognized and defined in English-speaking countries than elsewhere, although they have won noteworthy recognition in constitutions framed in central Europe since the World War. They have been given special prominence in the United States, where the national constitution, particularly in the first eight amendments, abounds in provisions pertaining to them. A familiar example is the regulation that "no state shall deprive any person of life, liberty, or property without due process of law." Another is the requirement that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . and to be informed of the nature and cause of the accusation."

The state sets up and maintains government as a means of promoting the well-being of men, and it has the same object in view when it guarantees individual rights as against governmental authority. In return, the citizen has obligations and duties. Three practically cover the ground: allegiance, obedience, service. That the citizen owes allegiance to the state of which he forms a part hardly requires argument. All states recognize treason, *i.e.*, breach of allegiance, as a heinous offense; as a rule, it is punishable by death. The naturalization of aliens is commonly so carried out as to stress the central fact in it, namely, the transfer of allegiance from one state to another.

Obedience is also an obligation. Practically, this means, of course, obedience to the *government*; for it is through the government that the state speaks. Obviously, there can be no effective government unless the laws are obeyed and the decisions of officers and courts carried out. Here, however, arises a difficult question. Are citizens obligated to obey a tyrannical government? The answer must depend largely on the circumstances. If the people can show that the government has usurped powers, or

¹ *Modern Democracies*, I, 54.

indeed that it has been tyrannical simply because it was able to overbear the public will, they are entitled to bring about a change of government if they can do so. If the people as a whole are not inclined to exercise this "right of revolution," the position of the individual malcontent becomes admittedly difficult. He may use his influence in all lawful ways to bring about a change. But unless, and until, his way of thinking prevails, he must obey the constituted authorities; or if, in obedience to principle, he defies the law, he must accept the penalties that fall upon him and find such comfort as he can in the approbation of his conscience.

The third great obligation is service. Legally, the state has a right to demand of every citizen any kind, and any amount, of service of which he or she is capable; and, under varying limitations fixed by constitutions or other fundamental laws, the agencies of government have the same right. In times past, personal service to the government has taken many forms: service in the army or navy; assistance in suppressing riots or rebellions, or in arresting disturbers of the peace; office-holding (which has not always been considered a privilege or honor); jury service; labor on highways and other public works; and, by no means least, the payment of taxes. In earlier days, much service was rendered in the form of produce or manual labor. Nowadays, however, taxation is the commonest form. Rather than neglect their own affairs in order to discharge their obligations by working for the government with their own hands, the citizens turn over to the government a small percentage of their earnings; and with the money thus obtained the government hires its own workers, who by giving all of their time, under a voluntary arrangement, attain a proficiency not to be expected of compulsory service. There is, however, no absolutely complete immunity from direct personal service. Even in the United States, any able-bodied man is liable to be called out at any time of emergency to become a member of a *posse comitatus*, or to assist in guarding property, or to aid in subduing a conflagration; he can be conscripted or "drafted" for military service; and he can be compelled to perform these duties, not only against his will, but at the point of the bayonet, and without hope of compensation.

3. Service

REFERENCES

- S. Leacock, *Elements of Political Science* (Boston, 1907), Chap. v.
 J. Q. Dealey, *The State and Government* (New York, 1921), Chap. XIX.
 W. F. Willoughby, *Government of Modern States* (New York, 1919), Chap. VIII.

- W. W. Willoughby and L. Rogers, *Introduction to the Problem of Government* (New York, 1921), Chap. vi.
- F. J. Goodnow, *Principles of Constitutional Government* (New York, 1916), Chaps. xx-xxii.
- J. Bryce, *Modern Democracies* (New York, 1921), I, Chap. vi.
- R. G. Gettell, *Introduction to Political Science* (Boston, 1910), Chap. ix.
- J. W. Burgess, *Political Science and Comparative Constitutional Law* (Boston, 1891), I, 174-183.
- W. S. McKechnie, *The State and the Individual* (Glasgow, 1896).
- G. Jellinek, *Declaration of the Rights of Man and of the Citizen* (trans. by M. Farrand, New York, 1901).
- W. H. Taft, *Four Aspects of Civic Duty* (New York, 1906).
- E. Root, *The Citizen's Part in Government* (New York, 1907).

PART II

THE FOUNDATIONS OF GOVERNMENT IN THE UNITED STATES

1. HISTORICAL BACKGROUNDS

CHAPTER VII

COLONIAL BEGINNINGS

Up to this point, we have had to do with some of the characteristics and problems of government in general. It seemed worth while to cast an eye over these before narrowing our gaze to the particular scheme or system of government which it is our primary business to study; for, after all, the story of government in the United States is only one chapter in the long record of man's invention, adaptation, and use of devices and methods that we call political. From here on, however, we are to be concerned quite definitely with one actual government as a going concern. Perhaps it would be more accurate to say, one governmental system; because we have in this country, as parts of a single integrated system, not only a national government but forty-eight state governments (to say nothing of county, city, and other local governments) which are largely separate and distinct, and even to a degree independent. All, however, are governments resting down directly upon the people—joint, coöperative, complementary agencies through which the work of public control is daily carried on. One quite as much as another is the student's own government, laying claim, as such, to his interests, loyalties, and service.

The government of the United States merits study not by Americans alone, nor by them merely because it is their own system. There are special reasons—in addition to the fact that it applies to three million seven hundred thousand square miles of territory and wields control over one-thirteenth of the entire population of the globe—why students of government everywhere look to it with interest. To begin with, the United States first disproved the old notion that a republican form of government is not suitable

Reasons
for
special
interest
in Ameri-
can gov-
ernment:

1. Republi-
canism in
a large
state

CHAP.
VII2. Federal-
ism on
a grand
scale3. A great
experiment
in democ-
racy4. Influ-
ence on
govern-
ment
throughout
the world

for a large and expanding state. All early republics were small, and long after the idea of representative government became entirely familiar political writers clung to the conviction that in the nature of things large states must be monarchies. Thus the French philosopher Montesquieu, near the middle of the eighteenth century, extolled republicanism on general lines but thought it not at all adapted to a country as large as his own. Even before the mechanical developments of the nineteenth century brought scattered populations into quick and easy communication, the United States, however, demonstrated that republicanism is workable on a large, as well as a small, scale. In the second place, it was in the United States that the federal form of government was for the first time brought into operation in a large way. Greece and northern Italy had, in ages long past, made use of the federal principle; in the eighteenth century Switzerland and the Netherlands were organized on that basis. But the United States first showed the possibilities of the plan as applied over a wide area, and at the same time proved it not inconsistent, as it had formerly been supposed to be, with strong national government.

Special interest attaches to American government, in the third place, because throughout its history that government has been a great experiment in democracy, and has been so viewed by the world. It is true that government in this country was by no means completely democratic in the earlier days; it is not in all respects democratic even now. But it has always been more democratic than most other governments, and while Americans have themselves commonly taken democracy for granted, for a century, as a recent writer observes, intelligent Europeans "were aware that popular government and social equality on such a grand scale were new things in the world."¹ In the fourth place, the governmental institutions and experience of the United States have deeply influenced the political development of many widely scattered states and peoples. Our own colonies—Alaska, Hawaii, Porto Rico, the Philippines—have received the American impress. Latin America, although drawing its law and culture largely from Spanish and Portuguese, and therefore non-Anglo-Saxon, sources, has copied extensively from the United States in political matters. The governments of the British overseas dominions—Canada, South Africa, New Zealand, and especially Australia—combine principles and forms drawn almost equally from the mother country and

¹ C. Becker, *The United States, an Experiment in Democracy*, 2.

from the United States. The makers of new constitutions in central and eastern Europe since the World War, although most influenced by French, Swiss, and other European political systems, were by no means unaffected by American ideas and experience.

CHAP.
VII

The American government of today was not created out of hand or by mere fiat. On the contrary, it is a product of growth, and its roots reach far into the past. He who would understand how it has come to be what it is must push his inquiries back beyond the adoption of the constitution, beyond the Declaration of Independence, beyond even the settlement of the seaboard colonies, into the England of Queen Elizabeth, of Edward I, of Henry VII, indeed of the good King Alfred. The original United States was, of course, not wholly English in origin, and as constituted today the nation is far from being entirely of English antecedents and character, in race, in ideas, even in language. For a hundred years before the Revolution, however, the country throughout its original extent was English territory, governed by Englishmen in English fashion, and its political institutions were, with rare exceptions, English. The settlers of New England and Pennsylvania and the Carolinas were mainly Englishmen, who came to the New World from various motives—love of adventure, desire for religious freedom, hope of economic betterment—but who in any case brought their English customs and ideas with them and had no intention of becoming anything other than Englishmen. They brought with them, too, all the rights and liberties which their forefathers had wrested from tyrannical nobles and autocratic kings: the right to participate, through representatives, in the making of laws; the right to equal treatment under the law; the right of self-taxation; the right of jury trial; the right to invoke the privilege of habeas corpus; the right of petition; the right of assembly. In so far as it was applicable, the common law was theirs in the new home no less than in the old. The colonial governments, whether imposed from London or set up by the colonists independently, were English-made and English-controlled.

Continuity
of American
political
development

What the
colonists
brought
with them

After the Revolution, the United States went its way as an independent nation; thenceforth American history and English history flowed in different channels. The Revolution was, however, not a cataclysm which cleared the ground for a wholly new social and political order, as was, for example, the great upheaval in France a decade later. Rather, it was only a secession. The

The Revolution only
a secession

patriots of 1775 took up arms fundamentally because they regarded the colonial policy of the mother country (especially as that policy found expression in the new taxes and in new devices to enforce the navigation laws) as unjustifiable, and because every other means of protecting what they felt to be their rights had failed. There were, indeed, critics of English political institutions among them. But such there were, and had always been, in England itself, and, speaking generally, the colonists, as late as 1775, had no desire to destroy or supplant the forms of political organization under which they lived.

Leading somewhat unexpectedly to independence, the Revolution started new lines of political development. The governmental institutions of colonial days were, however, largely carried over into the new era. The colonial charters survived to a considerable extent in the state constitutions; indeed, the charter granted to Connecticut by Charles II in 1662 served as the constitution of that state until 1818, and the charter received by Rhode Island in 1663 was superseded by a new constitution only in 1842. The colonial governor, with powers considerably altered, became the state governor. The colonial legislature went on substantially as before. County and town governments were but slightly modified. The suffrage was somewhat broadened, but not greatly. Qualifications for office-holding were relaxed, but only slightly. Everywhere the historic English common law remained the basis of the legal system.

The building up of the national government, and especially the adoption of the constitution, following a period of unusual political unsettlement and experiment, caused a wider departure from the past; and the steady expansion and readaptation of our political system since 1789 has brought us so far from our point of departure that the contrasts between, not only the English government and our own, but also our own government as it stands today and as it stood a hundred years ago, strike the observer very forcibly. These contrasts are, indeed, vast and significant, and they will frequently occupy our attention in the following pages. Yet it must never be forgotten that the development of government in the English-speaking world has been a long, steady progression, in which the United States has shared deeply, and that newer forms and practices in this country, as in the motherland beyond seas, are grounded upon and circumscribed by institutions and usages that are very old.

The early English settlements on the Atlantic seaboard were established under diverse conditions and by dissimilar groups of people. Virginia was founded by a London trading company and for a time was managed like any other commercial corporation. Plymouth was settled by earnest men of religion, whose main object was to find a place where they could worship as they desired. Maryland was colonized under the auspices of a great Roman Catholic proprietor, Pennsylvania under the guidance of a Quaker magnate. The first of the permanent colonies within the present limits of the United States, furthermore, dated from 1607 and the last from 1733—a stretch of a century and a quarter in which English government and civilization at home underwent great changes. Likewise, the settlements were drawn out along a north and south seacoast more than twelve hundred miles in length as the crow flies, embracing the subtropical borders of Florida and the snow-capped hills of New England.

Under these circumstances it was inevitable that the thirteen colonies should differ considerably in political organization. Some were governed under charters granted by the king to a single proprietor, as Baltimore or Penn; others, under charters issued to a company or corporation; still others, lacking a charter or other fundamental law, drew up constitutions of their own, as did Connecticut in 1639,¹ and made these serve until formal charters could be obtained. Until late, the mother country had no fixed policy concerning forms of colonial government. Hence the provisions of the charters on this subject were not always the same; and naturally those governments which were set up by the colonists themselves, although following English precedents, represented a spontaneous adjustment of political means to time and circumstance. Virginia, with its widely separated plantations strung along the river banks and its sharply divided population of landholding aristocrats and dependent servants and slaves, could not have been expected to employ the same political forms as Massachusetts, with its compact, town-dwelling, and relatively homogeneous population.

Taking the Colonial period as a whole, there was, none the less, a pronounced tendency toward political uniformity. All of the colonies except Rhode Island, Connecticut, Maryland, Penn-

CHAP.
VII

Natural
variation
of colonial
govern-
ments

Yet a
strong ten-
dency to
uniformity

¹The text of Connecticut's "Fundamental Orders" is printed in W. MacDonald, *Select Charters and Other Documents Illustrative of American History*, 60-65.

sylvania, and Delaware ultimately became "royal provinces," administered under royal commissions by governors appointed directly by the king; and the five colonies named had charters providing for governments fundamentally like the others. All of the thirteen had legislatures, which invariably tried, with more or less success, to gain greater power. All had the same common law and practically the same judicial organization and procedure. All cherished substantially the same political ideals and made use of the same fundamental political forms.

Control
from
England

Every colony was a royal enterprise in the sense that the lands which it occupied belonged to the sovereign and that its government owed its validity to his direct act or tacit assent. The royal control was more vigorous at certain periods than at others, and was more frequently asserted in the royal provinces than elsewhere. But in all cases it included the right to revoke or alter charters, to disallow, or veto, colonial legislation (except in Maryland, Connecticut, and Rhode Island),¹ to hear and decide appeals from the courts, and—except in Connecticut and Rhode Island—to appoint the governor directly or to confirm his appointment when made by a proprietor. The powers of the crown were normally, of course, exercised through subordinate agencies. Questions pertaining to colonial commerce were handled mainly by the Board of Commissioners for Trade and Plantations, organized by William III in 1696.² Governmental affairs were managed chiefly by the Privy Council. But the king could at any time take matters into his own hands, and occasionally he did so. Until past the middle of the eighteenth century, Parliament was considered to have no general power of control over the colonies. Its acts applied to them only when they contained an express provision to this effect; and such provisions were rare. The general growth, however, of its power, combined with the rise of new and difficult imperial problems, led Parliament after 1760 to begin enacting special revenue laws for the overseas settlements. The colonists promptly objected that there was no authority for such legislation, and the quarrel that resulted became the prologue of the Revolution.

In earlier times the colonies were regarded as trading and business enterprises. Hence their charters, like the patents issued to

¹ This power of veto was used freely. In 1705 Queen Anne negatived fifty-three laws of Pennsylvania at a single stroke. *Pa. Statutes at Large*, II, 454-456. There were, however, ingenious ways of evading the effects of a veto. See E. Channing, *History of the United States*, II, 242-243.

² *Ibid.*, 231-239.

other corporate and proprietary undertakings, were essentially directorial or managerial.¹ This means that the powers and functions for which the instruments made provision were almost exclusively executive. The charters did not assume to set up full-orbed governments; and although most of them provided for the calling of a legislative body at some future time, only those of Connecticut and Rhode Island were very definite on the subject. The executive agencies were expressly ordained; legislative, and to a considerable extent judicial, authorities were left to be supplied—as they soon were—by the companies, the proprietors, or the settlers themselves. When, in later times, the charters were revoked or revised and the colonies, in the main, became royal provinces, every care was taken to safeguard the authority and influence of the executive; and although the popular assemblies grew steadily in power and in independence of spirit, the executive, in most cases, kept the upper hand until the Revolution.

In every colony the chief executive was a governor. In the eight royal provinces this official was appointed directly by the king and was regarded as his immediate representative. As a rule, governorships were bestowed as rewards for services rendered the crown or as patronage solicited by influential men for their relatives or friends; hence the general level of ability was not high. There was no fixed term of office, and tenure was extremely uncertain; the ten royal governors of Massachusetts served an average of eight years, but changes were more frequent elsewhere. Normally, a governor was in charge of a single province. Sometimes, however, his jurisdiction was extended over two or more provinces, as was notably the case during the ill-fated governorship of Edmund Andros in 1687-88.

The governor's function was two-fold. He was the agent of the British crown, the guardian of interests that were imperial. But he was also the head of the somewhat separate and autonomous government of the colony. In the first capacity he was expected to proclaim and enforce the orders of the home government, to keep the king and his ministers informed upon colonial conditions, to advise upon policies and measures, and to oversee the minor royal officials stationed in the province. In the second capacity he enforced the laws made in the colony, appointed various civil and military officers, commanded the armed forces, issued war-

CHAP.
VIIExecutive
character
of the
early
chartersThe
governorExecutive
functions

¹P. L. Kaye, "The Colonial Executive prior to the Restoration," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XVIII, 8 (1900).

CHAP.
VIIControl
over legis-
lation

rants on the treasury, and represented the colony in its dealings with other colonies and with foreign states.

The governor's duties were, however, by no means exclusively executive and administrative. He had much to do also with legislation. He summoned, prorogued, and dissolved the assembly. He sent messages to that body and addressed it in person, not only communicating the wishes of the home government, but making recommendations of his own. In most colonies, he nominated the council, which served as the upper house of the legislature; and he presided over its deliberations. He had an absolute veto, and used it freely. Furthermore, he had important judicial functions. His commission regularly made him "chancellor," and that meant that he was head of the highest court in the colony. He also had extensive powers of pardon (except in cases of murder and treason) and reprieve.

Restric-
tions
upon the
governor's
powers

The legal powers of the governor were thus very broad, and in practice they were amplified by his official prestige and social position. On the other hand, the sweeping authority conferred in the commission issued at the time of appointment was apt to be much curtailed by instructions later sent out from London, and the governor was often called upon to perform acts of which he did not approve. Restraint also arose from the assembly's power of the purse. The incessant quarrels of the governors and assemblies in the eighteenth century centered in the use of this power, and by degrees the popular bodies established the right to make and withhold appropriations at pleasure. The governor's measures and requests were often thwarted by the refusal of an assembly to provide funds, and his own personal interests were brought in jeopardy by the right which the legislatures gained to vote or hold back his salary and to fix its amount.

The
governor
in colonies
other than
royal
provinces

The proprietary colonies were, in effect, great estates, and there the grantees and their heirs held sway both as landlords and as rulers. When present in the colony, a proprietor usually exercised most of the governor's functions in person; at other times these duties fell to a deputy, known either as governor or as lieutenant-governor, and appointed by the proprietor with confirmation (after 1696) by the crown. On the other hand, in Connecticut and Rhode Island the governor, instead of being appointed by king or proprietor, was elected for a term of one year by an assembly composed of the governor, the board of "assistants" (or council), and a body of representatives chosen by the enfranchised

inhabitants. Elected by the assembly, the governor was required to work in close conjunction with that body. He could not make appointments independently; he had no separate fiscal powers; above all, he had no veto.

CHAP.
VII

In all of the colonies the governor was advised, and to some extent controlled, by "assistants," or similar officers, who together composed a council, commonly of ten or twelve members. In the royal provinces (except Massachusetts after 1691) the councilors were appointed by the crown, usually on the governor's recommendation. In the proprietary colonies they were named by the proprietor, usually also on nomination by the governor; although in Pennsylvania the council itself shared the power of selection. However its members were chosen, the council had four main functions. It advised the governor and exercised a certain amount of restraint upon him in appointments, removals, and military and intercolonial affairs. It—or certain of its members singly—performed the duties of such present state officers as the secretary and treasurer. Everywhere except in Pennsylvania, Delaware, and Georgia, it served as the upper house of the legislature, thus becoming the forerunner of the present state senate. And, with the governor, it formed, in most colonies, a court which exercised original jurisdiction in certain kinds of cases and heard appeals from the lower tribunals.

The
governor's
council

By the close of the seventeenth century, and thereafter until the Revolution, every colony had an elective assembly, and in all except three cases this assembly formed the lower house of a legislature whose upper chamber was, as has been observed, the governor's council. Although variously termed a "house of burgesses," a "house of commons," and a "house of representatives," the assembly was everywhere a body of representatives elected in accordance with a general law by the enfranchised inhabitants of the colony. In the mother country no attempt had ever been made to apportion members of the House of Commons in accordance with population, and, as John Locke complained in 1689, petty towns which had fallen into utter decay frequently sent "as many representatives to the grand assembly of lawmakers as a whole county numerous in people and powerful in riches." In the colonies, representation was better systematized in that it was regulated by general law and was kept in closer relation to the distribution of population; although, here too, the existing local government areas—which often varied widely in population—

The legis-
lature

CHAP.
VIIDistribu-
tion of
representa-
tion in
England
and in the
colonies

were employed as electoral districts, with provisions for correcting only the most glaring inequalities. In New England the town was the unit of representation. Thus the Connecticut assembly was composed of two deputies from "each place, Towne, or Citty," regardless of population. In the middle and southern colonies the unit was the county, save in South Carolina, where it was the parish.

Restric-
tions on
the suf-
frage

Furthermore, the suffrage was confined to a small fraction of the population. The imperial government left its colonies practically free to fix qualifications for voting as they liked. But the example of the home country—where the county electorate included only substantial landholders and the borough franchise was restricted to the principal taxpayers or to other small groups—was influential; and the well-being of the colony was usually thought to require keeping the suffrage in few and carefully selected hands. Every colony, on the eve of the Revolution, had a property qualification. In five, ownership of personal property sufficed. But in seven, no one could vote unless he owned real estate. There were also moral, religious, and racial qualifications. Thus the New England colonies, especially in the earlier days, expected voters to give proof of good moral character; indeed, as a rule, the Puritans aimed to restrict the suffrage to their own church members in good standing. Catholics were often debarred; and some southern colonies excluded Frenchmen, Jews, and negroes.

Small
number
of voters

As a result, the electorate was, as in the mother country, very small. It has been computed that in Massachusetts and Connecticut only sixteen per cent of the inhabitants were voters; in Rhode Island, nine per cent; in rural Pennsylvania, eight per cent; in the city of Philadelphia, two per cent. On account of the difficulties of travel, the largeness of many electoral districts, and the absence of party machinery, it often happened, too, that not more than one-sixth, or even one-eighth, of the people who were qualified to vote actually did so.¹ Special property qualifications were also usually required of assemblymen, and often some form of religious test besides.

Growth
of the
assemblies
in power

The colonies, said Edmund Burke in 1777, "formed within themselves, either by royal instruction or by royal charter, assemblies so exceedingly resembling a parliament, in all their forms, functions, and powers, that it was impossible they should not

¹ K. H. Porter, *History of Suffrage in the United States*, Chap. I.

imbibe some opinion of a similar authority."¹ Whether in corporate Connecticut and Rhode Island or in provincial Virginia, the assemblies indeed "imbibed" a decided opinion of this sort. Taking advantage of the generally broad, and even vague, provisions of the charters and other fundamental laws, they laid claim to all the powers and privileges of the English House of Commons and declared themselves entitled to make laws, or otherwise take action, upon all manner of domestic affairs. They had, of course, to reckon with the royal power of veto as exercised through the governor or as brought to bear directly by the crown, sometimes after measures had been on the statute-books for years. But they were frequently able to nullify a veto's effect by passing a "temporary" act, or a series of such acts, accomplishing the purpose in hand. Their claims to financial power brought them into repeated conflicts with the governors. But here again they usually triumphed; indeed, their control over appropriations became a means by which they often wrested concessions from the governor, and from the crown, on non-financial matters. Many times the governor was compelled to disobey or ignore his instructions in order to keep the wheels of government moving. In short, on the eve of the Revolution the assemblies were steadily growing, not only in the spirit of independence, but in actual power; and the experience gained by their members in fighting for what they regarded as their rights became a powerful asset of the colonies in the new era of conflict.

Arrangements for the administration of justice followed the same general lines in all of the colonies and were modeled closely on English usage. There were commonly three grades of tribunals: the justices of the peace, the county courts, and the courts of appeal. The justices of the peace were usually appointed by the governor, although in some instances they were elected by the freeholders; and their jurisdiction extended only to petty offenses and to civil cases involving small amounts, *e.g.*, less than five pounds in New York and less than forty shillings in Massachusetts. The county courts, whose judges were appointed by the governor,² had criminal jurisdiction over all except capital cases and over civil cases involving varying, but relatively large, amounts. In most of the colonies the court of appeals consisted,

¹ Letter to the Sheriffs of Bristol, *Works* (4th ed., Boston, 1871), II, 232.

² Except in New Jersey, where they were elected. An elective judiciary was unknown in England, and there were only traces of it in America prior to the Revolution.

as has been pointed out, of the governor and his council. In weighty matters, appeal lay from the courts of appeal to the king in council—that is, practically, to the Privy Council, which, in lieu of judicial “decisions” (for the body was not a court) advised the king whether to sustain the actions of the colonial tribunals or to reverse them. All of the colonial courts recognized and enforced not only the colonial statutes, but the common law and such acts of Parliament as were made to apply to America; and English judicial procedure, including trial by jury, was universally adhered to.

The development of a colony did not go far before it became necessary to make arrangements for separate, though subordinate, management of the affairs of local subdivisions. These arrangements were naturally determined quite as much by the physical conditions under which the people lived as by the temperament of the inhabitants themselves. Hence they reproduced the institutions of the mother country less closely than did other parts of the governmental system, and greater variations appeared from colony to colony. The people of New England settled in compact communities. They could easily live in that fashion and carry on their small-scale farming and their trade; they felt the need of protection against Indian attacks; and they wanted to remain in close fellowship with the religious congregations to which they belonged. Accordingly, the main unit of local government in all of the New England colonies was the town. The county existed, but was important chiefly as a judicial area.

The New England town was not necessarily an urban center. It was, more properly, a township, often entirely rural, although likely to contain at least a village. At all events, it was small, and its people could readily come together for worship, for social intercourse, and for political action. The governing authority was a primary assembly of voters known as the town meeting, which convened at least once a year and made by-laws on all sorts of subjects, levied taxes, voted appropriations, and elected not only the local representative (or representatives) in the colonial assembly, but the officers—chiefly a board of “selectmen” of three to thirteen members—who administered the town’s affairs during the ensuing twelve months. Most of the time these little governments went along with a minimum of interference from the colonial and English authorities, and the experience which the inhabitants gained in the management of their affairs, even though on a small

scale, was of inestimable value in the larger era of self-government ushered in by the Revolution.

CHAP.
VII

The county

In the southern colonies the plantation system caused the population to be scattered, and the principal unit of local government naturally became the county, which followed its English prototype as closely as conditions permitted. There was no popular assembly, and most of the officers—lieutenant, sheriff, coroner, and justices of the peace—were appointed by the governor, commonly on nomination by the justices. In the middle colonies a mixed system of town and county government grew up, but after 1688 the town was gradually overshadowed by the county, especially in Pennsylvania.¹

Like Englishmen at home, the colonists were, in general, hard-headed, practical men who dealt with questions as they arose and were not much given to political speculation. After 1760 their remonstrances against the attempts of Parliament to legislate for them and to tax them led to much discussion of constitutional theory and political rights. Prior to that time, however, such protests as they found it necessary to voice commonly appealed to the laws and usages of the realm rather than to abstract doctrines. The political views which they held were drawn from a variety of sources. The Puritans and Quakers leaned heavily upon the Scriptures. English treatises—Richard Hooker's *Laws of Ecclesiastical Polity* (circa 1594), Milton's political essays, Harrington's *Commonwealth of Oceana* (1657), and above all, John Locke's *Two Treatises of Government* (1690) and Algernon Sydney's *Discourses concerning Government* (1698)—contributed much. In the main, however, the colonists' ideas rose directly out of the English constitutional system and the common law, enriched by centuries of precedent and tradition. Naturally, they added something as a result of their own experience.

Sources of
political
ideas
in the
colonies

The salient fact about political thought in the colonies is its gradual movement in the direction of democracy. Throughout the colonial period English government, while based in an increasing degree on the supremacy of Parliament, was in no true sense democratic. The House of Lords was composed almost entirely

Undemo-
cratic char-
acter of
colonial
govern-
ments

¹It should be added that the foundations of American municipal government were laid during the Colonial period by the incorporation of twenty boroughs under charters conferred by certain governors. New York received the first such charter in 1686. The governing authority of an incorporated borough was, on the English analogy, a single-chambered council consisting of a mayor, a small number of aldermen, and a larger number of councilors. See W. B. Munro, *Government of American Cities* (rev. ed.), 2-5.

of hereditary peers, and only an insignificant fraction of the people had any part in choosing the members of the House of Commons. Of the Englishmen who came out to America, very few cherished democratic opinions. Certainly the Cavaliers who populated Virginia and other southern colonies, and for generations formed a jealous, exclusive, ruling aristocracy, were not democrats, save in their dealings one with another. No more were the Puritans of New England. They had, indeed, resisted the absolutism of the Stuarts and had come to the New World in quest of freedom. But the freedom which they sought was the opportunity to set up a society based on their own civil and religious ideas, not a condition in which all members of a mixed community should have equal rights and be individually free to believe and act as they pleased. The establishment of an aristocracy was seriously proposed in Massachusetts in 1634, and shortly thereafter John Cotton pronounced democracy "the meanest and worst of all forms of government." When, in later times, religious requirements were relaxed, property qualifications were imposed similar to those which confined the electorate in the middle and southern colonies to a mere handful of the people.

Conditions
favorable
to democ-
racy

Nevertheless, the colonial period, taken as a whole, saw political opinion considerably democratized. The exceedingly liberal governmental systems of Connecticut and Rhode Island were influential. The remoteness of the colonies from England made for political separateness, which in turn gave scope for the readjustment of political usage and opinion. The conditions of life in a new country, furthermore, are always favorable to democracy: social classes are not sharply differentiated; men are thrown back upon their own efforts and have a chance to win standing and power without much regard for antecedents; smallness of numbers requires the coöperation of all elements. The hardy populations which, even before 1750, were spreading through the back-country of New England, New York, Virginia, and the Carolinas were, after the manner of frontier populations everywhere, specially inclined to democratic sentiments.¹

Democratic
tendencies

The progress of democratic opinion was further aided by the course of politics in England itself, where, although the suffrage

¹The influence of the frontier on the political development of America is clearly described in F. J. Turner, "The Significance of the Frontier in American History," *Amer. Hist. Assoc. Report* (1893), 197-227, and in the same author's *The Frontier in American History* (New York, 1920).

remained unchanged, such legislation as the Habeas Corpus Act of 1679 and the Toleration Act of 1689 steadily added to the personal liberty of the subject, and where, after 1660, the representative principle gradually won its way against prerogative, while the cabinet plan of responsible government silently transformed the entire political system. Local self-government as developed in the New England towns, although not itself as yet democratic, was a necessary antecedent of democracy. Vigorous elective assemblies, although not as yet representative of the masses, were necessary if the masses were ever to rule. The sentiment which upheld these bodies in their steady accumulation of power manifested itself also in a growing demand for popular election of a larger proportion of the officers, for shorter terms of office, for the right of the assemblies to judge the qualifications of their members, for frequent reapportionments of legislative seats, for habeas corpus acts and other guarantees of civil rights, and here and there for a broader suffrage.

REFERENCES

- J. Schouler, *Constitutional Studies* (New York, 1904), Chap. II.
 J. H. Finley and J. F. Sanderson, *The American Executive and Executive Methods* (New York, 1908), Chap. I.
 C. E. Merriam, *History of American Political Theories* (New York, 1903), Chap. I.
 R. G. Gettell, *History of American Political Thought* (New York, 1928), Chap. III.
 C. Becker, *The United States, an Experiment in Democracy* (New York, 1920), Chap. II. A new edition of this book, with contents unaltered, was published in 1927 under the title *Our Great Experiment in Democracy*.
 H. L. Osgood, *The American Colonies in the Seventeenth Century*, 3 vols. (New York, 1904-07.)
 ———, *The American Colonies in the Eighteenth Century*, 2 vols. (New York, 1924).
 F. B. Greene, *The Provincial Governor in the English Colonies of North America* (New York, 1898).
 K. H. Porter, *History of Suffrage in the United States* (Chicago, 1918), Chap. I.
 A. E. McKinley, "The Suffrage Franchise in the Thirteen English Colonies," *Univ. of Pa. Publications, Series in Hist.*, No. 2 (Philadelphia, 1905).
 C. F. Bishop, "History of Elections in the American Colonies," *Columbia Univ. Studies in Hist., Econ., and Public Law*, III (New York, 1893).
 E. Channing, "Town and County Government in the English Colonies," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, II (Baltimore, 1884).
 L. P. Kellogg, "The American Colonial Charter," *Amer. Hist. Assoc. Reports*, I, 185-341 (1903).

E. B. Russell, "Review of American Colonial Legislation by the King in Council," *Columbia Univ. Studies in Hist., Econ., and Public Law*, LXIV (New York, 1915).

E. P. Cheyney, *European Backgrounds of American History* (New York, 1905), Chaps. VII-VIII, XIII-XVI.

J. T. Adams, *The Founding of New England* (Boston, 1921).

CHAPTER VIII

THE FIRST STATE AND NATIONAL GOVERNMENTS

After the French and Indian War the ministers of George III decided that the time had come for a general toning up of colonial administration. Never completely controlled from the home land, the American settlements had by that day become largely independent. They had their own assemblies and made their own laws. The few acts of Parliament that applied to them were only partly enforced. Except in the form of occasional duties on exports and imports, they paid no taxes to the mother country. Only now and then did the home authorities give them much attention, save as was necessary for their military protection.

The
American
Revolution

King George's government now decided to do three things, chiefly: (1) to enforce to the letter the long-evaded laws regulating colonial trade, (2) to station British regulars in the colonies as part of a permanent system of imperial defense, and (3) to ask the colonists to pay taxes to help meet the cost of maintaining their future security. As viewed by most Englishmen, these purposes were entirely reasonable. As seen by many Americans, however, they were unnecessary, unjust, and contrary to the rights of the colonists as British subjects. Unacquainted with the real state of affairs in the dependencies, the king's government went ahead with its program, and when obstructed by colonial opposition merely shifted its measures and methods without definitely abandoning its general policy. The upshot was a series of events—familiar to every American schoolboy—which steadily widened the breach until, in April, 1775, debate gave way to action. From the ministers' well-meant but ill-advised decision flowed the Revolutionary War, the independence of the thirteen colonies, and the establishment of a new trans-Atlantic English-speaking nation.

The war itself does not concern us here; nor yet the diplomacy by which foreign aid, and eventually membership in the family of nations, was obtained. Rather, as students of government, we have to do with three developments which are definitely political,

Political
develop-
ments

namely, (1) the growth of opinions and attitudes on the nature and functions of government, (2) the conversion of the colonial governments described in the preceding chapter into our earliest set of "state" governments, and (3) the country's first great experiment with union, and with political organization, on a national scale.

In the nature of things, revolution is the work of radical-minded people. In the case of America, this was doubly true, because not only was it the men of radical temper—the Otises and Patrick Henrys and Samuel Adamses—who led the colonies to conflict with and separation from Great Britain, but the movement became also a revolt against aristocracy and privilege in the colonies themselves. Everywhere the colonial populations were composed of two main elements, with sharply contrasted interests and points of view. One was the little land-holding and commercial aristocracies—the tidewater planters in Virginia and the Carolinas, the wealthy commercial families of New York and Pennsylvania, the descendants of old official, clerical, and professional families in New England—which monopolized social influence and prestige, held the offices, and in the fullest sense governed. The other element was the "people," the unenfranchised small freehold farmers, tenants, artisans, and laborers. By 1775, however, this stratification was becoming less stable than it had been. The people on the lower plane were in many instances of liberal, and even radical, antecedents, and had migrated to America on that account; the searching discussions of the past ten years had provided a vent for their views; the back-country of Virginia, the Carolinas, Pennsylvania, and New York was filling with a hardy folk among whom prevailed the simple manners and the easy equality of the frontier. In short, the forces of democracy were growing stronger and were becoming articulate; they entered into the political discussions of the day; they took more or less irregular part in local organization for war purposes; tenants and artisans shouldered their muskets and fought at Bennington and Brandywine and Saratoga; and when new constitutions were to be made and governments reconstructed, these unenfranchised people pressed for the suffrage, the right to hold office, and other political and social recognition. The privileged classes, on the other hand, clung to English manners and ideals and were sorry when independence became necessary. They considered the English system of government quite democratic

enough; they wanted "home rule," but, as one writer has aptly said, they wanted to rule at home.¹

CHAP.
VIII

Radicalism
in the
ascendant

The Revolution became, therefore, a two-fold movement. It was a contest for independence from Great Britain; but it was also a struggle for the abolition of class privilege and the democratization of American society and politics. To a considerable extent, the privileged classes—land-owners, merchants, clergymen, and officials—remained loyal to the British government.² If they had kept control there would have been no separation. But sooner or later they lost their grip in all of the thirteen colonies; and the great movement which they had helped to start was carried forward by other men, on lines that led both to independent nationality and to internal political democratization. Some of these later leaders were, it is true, men of means and of conservative instincts; one immediately thinks of Washington, reputed the richest man in the colonies. But in the main they and their followers were people of small propertied interests and of limited business experience, with only here and there a figure of the type of Jefferson, who, although a plantation-owner and slave-holder, was by temperament and training radical-minded in politics. They were, in general, people who risked little by change, being, indeed, likely to gain something, socially and politically, by it. They did not stop with arguments for constitutional rights as colonists, or even for independence. Drawing heavily upon the great resources of English liberal thought in the seventeenth century—especially as brought together in the writings of Locke—they turned their minds to the rights of man as such, and to the reconstruction of life and government in America on more democratic lines. The Declaration of Independence was their work, and it asserted, as "self-evident" truths, that all men are created equal; that among the inalienable rights with which men are endowed by the Creator are life, liberty, and the pursuit of happiness; that governments are instituted among men to secure these rights; that governments derive their just powers from the consent of the governed; and that the people have a right to alter or abolish their government whenever it "becomes destructive of these ends"—in other words, a right of revolution. The bills of rights incorporated in the new constitutions which, even before independence, began to displace the old char-

¹ C. Becker, *The United States, an Experiment in Democracy*, 46.

² John Adams estimated that at least one-third of the people were indifferent or actively opposed to the American cause.

ters, reiterated the doctrine that the powers of government are delegated by the people, and repeated the familiar principles of the Great Charter, the English Bill of Rights, and other historic pronouncements concerning property, trials, excessive bail, unusual punishments, the writ of habeas corpus, freedom of assembly, the right of petition, liberty of the press, and other "inalienable" rights.¹ Aristocratic privileges and usages were frowned down or expressly abolished.

Negative
conception
of govern-
ment

In their revolt against the alleged tyranny of unwise British ministers and of a misguided Parliament, many people came, indeed, to think of government as hardly better than a necessary evil. Life and property must be protected; social order must be maintained. But beyond this, it was widely held, government ought not to be allowed to go. It were better to run the risk of occasional riots and other disturbances than to have too much government. The oft-quoted remark of Jefferson that that government is best which governs least expresses the idea that underlay, not only the Declaration of Independence, but the early constitutions of the states, and the Articles of Confederation as well; and it is not to be wondered at that, under the impetus of this philosophy, the makers of the earliest national constitution provided for a form of organization which proved too weak to serve even the minimum purposes for which government was supposed to exist. Hard experience showed the reaction against government regulation to have been carried much too far.²

The Revo-
lutionary
state gov-
ernments

After the outbreak of war in 1775 the old colonial governments largely collapsed, and the control of affairs passed into the hands of rump legislatures, specially chosen "conventions," and other more or less irregular bodies. When appealed to for advice, the Continental Congress at first counseled the colonies to set up such new political machinery as was needed to carry them over to the time when good relations with the mother country should be restored; and two colonies, New Hampshire and South Carolina, drew up provisional constitutions for this purpose. As the war went on, new appeals for guidance came in, and on May 15, 1776, blanket advice was given to all the colonies to "adopt such government as

¹ On the Revolutionary bills of rights see J. Schouler, *Constitutional Studies*, Chap. III. The relation of these declarations to the English Bill of Rights of 1689 is touched upon in G. B. Adams, *Constitutional History of England* (New York, 1921), 357-358.

² The political thought of the Revolutionary period is treated more fully in C. E. Merriam, *History of American Political Theories*, Chap. II, and R. G. Gettell, *History of American Political Thought* (New York, 1928), Chap. IV.

shall in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.”¹ One after another, the colonies—now become states—took action; and by 1780 all had constitutions, although Connecticut and Rhode Island had merely to introduce a few formal changes to make their charters adequate for the purpose.²

CHAP.
VIII

Several of the new instruments were framed by assemblies chosen with constitution-making somewhat in view. But in most cases the constitutions were made and put into operation by bodies selected merely for the general management of affairs, and in only two states—namely, Massachusetts and New Hampshire—were they the work of conventions which confined their labors to this one task. In a half-dozen states the constitutions were submitted to the people, but in only two—Massachusetts and New Hampshire—was popular ratification made a necessary condition of adoption.³ On the theory that the people had an inherent right to change their form of government at any time through their elected representatives in legislature or convention, five states made no special provision for amending their constitutions. Georgia and Maryland, however, authorized the legislature to adopt amendments; Delaware and South Carolina provided for amendments either by the legislature or by convention; Pennsylvania, by a council of censors and a convention; Massachusetts and New Hampshire, by conventions called by the legislature. The idea that constitutions should be made and amended by a different agency, and by a different process, from that employed in the making of ordinary laws was less generally held than it is today, and popular ratification of amendments was required in only Massachusetts and New Hampshire. Notwithstanding the somewhat undemocratic, and even irregular, way in which most of these early constitutions were set in operation, the majority of them served

The new
constitu-
tions

¹ *Journals of the Continental Congress*, IV, 342.

² As we have seen (p. 25), these written constitutions were a distinct innovation. They arose, however, quite naturally. In the charters, proprietary patents, and commissions to royal governors, each colony had a body of fundamental organic law, in which every phase of governmental authority and organization in the colony found its legal basis and justification; so that the colonists were entirely familiar with the idea of a supreme written law by which all governmental acts and powers were to be tested. The new constitutions were devised to perpetuate this principle under the changed conditions that had arisen.

³ This statement applies to the New Hampshire constitution of 1784, not to the provisional instrument of 1776.

their purpose, with few changes, or none, for as long as fifty or seventy-five years. Massachusetts, indeed, did not thoroughly re-construct her constitution of 1780 until 1918.

Although differing widely in details, these Revolutionary state constitutions, and the governments which operated under them, had many important features in common. First, the people were regarded as the sole source of authority; the rule of the king was broken, and sovereignty had passed completely to the politically organized populations of the states. Second, the governments had only such powers as were bestowed upon them by the people through their representatives, and hence were merely agents of the people. "All power being originally inherent in, and consequently derived from, the people," said the Pennsylvania Declaration of Rights, "therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them." Furthermore, since it was believed that government by its very nature tends to become oppressive, care was taken to confer only those powers which were strictly necessary and to provide means by which the abuse of power could be punished and prevented.

Third, the principle of separation of powers was brought into play to a greater extent than in the colonial governments. In stately language the Massachusetts constitution said: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them; the judiciary shall never exercise the legislative and executive powers, or either of them: to the end that it may be a government of laws and not of men." This principle, made familiar by the writings of Locke and Montesquieu, was much in men's minds in the later eighteenth century. It must not be imagined, however, that the states applied it literally and fully in their governments. In most cases they gave the legislature a decided preponderance, and even in Massachusetts the legislative and executive branches were made to check each other reciprocally.

Fourth, much emphasis was placed on private rights and liberties. Seven states prefixed bills of rights to their constitutions, and in all cases it was made plain that the individuals composing the sovereign people had rights which were beyond the power of the government to deny or withdraw. Fifth, the doctrine of popular sovereignty was not construed to imply the establishment of com-

plete political democracy. On the contrary, it was thought best to restrict the suffrage to men who had some financial interest in the community—practically, therefore, to property-holders. A property qualification for voting was imposed in every state, and in most cases it debarred more than half of the adult male population. High property qualifications were set up also for membership in the legislatures and for office-holding.

CHAP.
VIII

The framers of the new constitutions drew heavily upon the English constitution and upon the political experience of the colonies. But they naturally made large use of the old charters, and it was rather the basis than the structure of the former governments that, in the main, was changed. There continued to be in every case a governor, a legislature, a system of courts, and the requisite machinery for local administration. The main objection to the colonial governments had been the power, and the opportunities for the abuse of power, enjoyed by the governor. Hence the governor was now shorn of much of his authority, and in most cases was definitely subordinated to the legislature. In most states he was, indeed, elected by the legislature, although in two or three he was chosen by the people.¹ In seven states the term of office was only one year. In Massachusetts alone was a qualified veto power allowed to the governor independently, although by 1800 four other states revived it.² In several instances impeachment was provided as a means of removing an unworthy or dangerous executive from office. Everywhere the governor was made to share the important power of appointment with a council or with the assembly.

The
governor

On the other hand, the legislature, as a body standing close to the people, was given comparatively large powers. The legislatures of Georgia and Pennsylvania had consisted of a single house in colonial times, and these states clung to the unicameral plan, in one case until 1789 and in the other until 1790.³ Elsewhere the bicameral system was continued, with no important change except that the governor's council, in becoming a senate, became elective,

The
legislature

¹ It should be noted, however, that even where popular election prevailed it fell to the legislature to elect when no candidate received a majority of all the votes cast.

² In Massachusetts measures could be passed over the governor's veto by a two-thirds vote in both houses of the legislature. In New York the veto power was shared by the governor and council, and a veto could be similarly overridden in the legislature.

³ Vermont entered the Union in 1791 with a single-chambered legislature and kept it until 1836.

its members being chosen—for terms of from two to five years, and by direct vote in all states except Maryland—from either existing or newly-created districts different from the areas in which assemblymen were elected.¹ Elections to the lower house were annual except in South Carolina, where they were biennial.

Structurally, the judicial system underwent practically no change. It was necessary, however, to provide some new mode of choosing the judges formerly named by the crown. In one state—Georgia—popular election was introduced. The remaining states adopted, in almost equal numbers, two other plans—(1) election by the legislature and (2) appointment by the governor, either with or without the consent of the council or the senate. New York, however, put the power to appoint in the hands of a committee of four senators. Appeals from American courts to the king in council were, of course, terminated by independence.

The most significant development in relation to the judiciary found mention, however, in none of the constitutions. This was the right of the courts to inquire into the constitutionality of laws and to refuse to enforce measures held to be unconstitutional.² Appeals to the king in council had familiarized Americans with the idea of judicial review, and notwithstanding that the constitutions were silent on the subject, judges were soon found claiming the power of pronouncing legislation void because in conflict with the constitution under which it was enacted. Virginia and New Jersey courts began to take to themselves this authority in 1778 and 1780, and in the memorable case of *Trevett v. Weeden* a Rhode Island court declined, in 1786, to enforce a statute laying a penalty for refusing to accept paper money at its face value, on the ground that the law was unconstitutional and void.³ The right of the courts to do this was questioned at the time, and still more after 1789. But at all events the actions taken emphasized in a wholesome manner the supremacy of the constitutions as bodies of fundamental law and the obligation of the legislatures, no less than of

¹ In most states a separate executive council was provided for, but four discarded the arrangement before 1800.

² The constitution of Massachusetts authorized the legislature to consult the judges in advance on a proposed measure, but said nothing about action by the judges after the measure was on the statute book.

³ For the argument in this case see J. B. Thayer, *Cases in Constitutional Law*, I, 73-78. Cf. E. S. Corwin, "The Establishment of Judicial Review," *Mich. Law Rev.*, IX, 102-125, 283-316 (Dec., 1910, and Feb., 1911); B. Coxe, *Judicial Power and Unconstitutional Legislation* (Philadelphia, 1893).

the governors, to keep within the limits of power prescribed for them.

CHAP.
VIII

It had never been easy for the colonies to work together, and no enduring union was built up among them until the breach with the parent state drove them to organize for coöperation in 1774-75. Even then, no strictly political union appeared except such as found expression in a voluntary consultative meeting of delegates known as the Continental Congress. The first such Congress assembled at Philadelphia, September 5, 1774, and sat intermittently until October 26. The second Congress met in the same city May 10, 1775, and, with frequent changes of personnel, served as the country's sole organ of national government until March, 1781.

The Conti-
nental
Congress

The Continental Congress was of great service in carrying on the war. It raised armies, appointed generals, managed foreign relations, arranged the French alliance, advised the states on the making of their new constitutions, and in other ways led and served the cause. Even for war purposes, however, the Congress was gravely defective; and as an instrumentality of government it was, in the long run, impossible. In the first place, it had no legal basis. It began as a mere voluntary conference for the discussion of grievances and remedies; it had no sanction in British instructions and regulations; and after independence, as before, it rested on no constitution and commanded support only as an extra-legal, revolutionary body.

Its
defects

From this it follows that the Congress had no powers except such as it assumed, or, at the most, such as the people and their governments in the several states informally consented to permit it to exercise. Historians and constitutional lawyers, it is true, are not agreed upon what actually happened when independence was declared. Some consider that the very act of breaking the bonds which united the thirteen colonies with Great Britain threw down the barriers separating them from one another and merged them in one sovereign nation, with the Congress as a legal organ of a united authority.¹ But there is no evidence that contemporaries viewed the matter in this way. On the contrary, they plainly conceived of the thirteen colonies as having become so many independent, sovereign political areas, *i.e.*, states, in the full meaning of the term. For war purposes, these states did, indeed, maintain certain machinery in common, chiefly the Congress and

Sovereign-
ty of the
states

¹J. W. Burgess, *Political Science and Constitutional Law*, I, 100; H. von Holst, *Constitutional History of the United States*, I, 8.

the armies. Legally, nevertheless, each state had unrestricted powers of self-government, and was entitled to resume complete independence of action at any time that it desired. The Congress was made up of delegates who, in effect, sat as ambassadors; their votes were the votes of states, and, logically enough, were cast in indivisible blocks, so that each state had one vote. The states constantly asserted and exercised their sovereignty, even going so far as to carry on occasional negotiations with European powers in disregard of the foreign policies of the Congress. All were inclined to consider the Congress a temporary expedient; Pennsylvania and North Carolina provided in their new constitutions for sending delegates only "as long as such representation shall be necessary."¹

Need of a
stronger
union

Experience soon proved, however, that a simple league, on these lines, was totally inadequate. The war promised to last for many years and to demand every ounce of strength that the people could muster; finance, commerce, foreign relations, military and naval operations, called for management at the hands of a government resting on some legal basis, formally endowed with powers, and assured of some degree of permanence. From these practical needs sprang the idea of a real and lasting union of the states—in other words, that spirit of American nationality which gradually broadened and deepened until it found expression, on the political side, in the Articles of Confederation, the constitution, and ultimately the vast and complicated mechanism of national control which we know today as the government of the United States. Notwithstanding the obvious advantages of closer union, the building of the American nation was, however, a gigantic task, which, in the nature of things, had to be accomplished slowly. The jealousies and suspicions of colonial times were not dropped when the war broke out, or when independence was secured. On the contrary, they were in most cases intensified; and many new sources of friction appeared. Even after the union had taken on presumably definite form under the constitution, the question of the distribution of powers between the national government and the states produced controversies which in a few decades brought the country to civil war. From whatever point of view considered, the transition from the Continental Congress to the government under the constitution, accomplished as it was within the space of hardly a dozen years, was a remarkable political achievement.

Obstacles
to union

¹ C. H. Van Tyne, *The American Revolution*, 178.

On June 7, 1776, Richard Henry Lee, of Virginia, introduced in Congress his famous resolution declaring the colonies "free and independent states" and at the same time moved the appointment of a committee to draw up "articles of confederation." Scattered proposals looking in these directions had hitherto attracted little support; a new plan of union offered by Franklin on July 21, 1775, had been easily crowded off the calendar by other business. Congress had now, however, come to the point where it could no longer evade or postpone either issue. Hence on June 11 a committee was appointed to draft a declaration of independence, and on the following day another to draw up a plan for a more substantial union. The result in one case was the Declaration of Independence, adopted by Congress on July 4; in the other, the preparation of the first constitution of a united America, *i.e.*, the Articles of Confederation.

CHAP.
VIII

The
Declaration
of Inde-
pendence
and the
Articles of
Confedera-
tion

The committee on union found two carefully thought out schemes ready for its consideration. One was the plan offered the year before by Franklin; the other was a device drafted by John Dickinson, of Delaware, who was himself a member of the committee. This expedited the work, and on July 12 the committee reported to Congress a plan which bore evidence at every point of having been framed with a view to persuading the mutually jealous states, especially the smaller ones, that they could enter the union without yielding powers and rights which they considered essential to their well-being. Even so, the process of adoption was slow and arduous. After a few weeks of discussion, Congress put the project entirely aside until the next spring in order to give the states a chance to consider it. Not until November 15, 1777, could the instrument be finally got through; and since by its own terms it could not take effect until ratified by every one of the states, other and still longer delays ensued. Eleven states ratified within about a year. But Delaware held back until 1779, and Maryland until 1781. The new plan, therefore, went into operation on March 1, 1781, three and one-half years after Congress adopted it. By that time the war which had called it into being was fast approaching an end.¹

The
Articles
ratified

Under the Articles the United States had for the first time a government resting on a written constitution and endowed with a reasonably definite body of powers—a government which, it must

Continued
sovereignty
of the
states

¹ The text of the Articles is printed in W. MacDonald, *Select Documents Illustrative of the History of the United States, 1776-1861*, pp. 6-15.

not be forgotten, was considerably superior to the extra-legal Continental Congress, even though it, in turn, proved inadequate and had to be discarded. Four main features distinguished it. The first was the unimpaired sovereignty of the states. "Each state," says Article II, "retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled." As we shall see, men differed widely in earlier times on the question of whether the states were sovereign under our present constitution. Under the Articles, however, the situation was never in doubt. The states delegated to the national government the right to exercise certain powers and denied certain powers to themselves. But they retained full sovereignty over their own citizens; the union was only a loose confederation, or league; and, notwithstanding that the Articles spoke of it three times as "perpetual,"¹ the members plainly regarded themselves as entitled to withdraw if they desired.

Lack of
direct
power over
individuals

A second main feature followed naturally from the first: the government of the Confederation had little contact with individuals, but operated chiefly upon the states. It could not, for example, tax private property in order to meet its expenses; it could only make requisitions upon the states for funds, in proportion to land values, and the states were free to raise the money in any way they chose. The central government could not reach down past the state governments to control the people in any effective manner. Aside from a provision for the extradition of fugitives from justice, a guarantee of mutual recognition of "the privileges and immunities of free citizens in the several states," and a pledge of freedom of interstate migration, trade, and general intercourse,² the Articles contained, indeed, nothing of importance relating to the individual as such.

The
Congress

A third feature was the simplicity, not to say meagerness, of the machinery of government. The management of the country's general interests was entrusted to a unicameral Congress, meeting annually and composed of delegates appointed in each state in such manner as the legislature thereof directed. Each state paid its own delegates, and could recall them and appoint others at any time; and no person could serve more than three years in any six. A state might send any number of delegates from

¹ In the Preamble and twice in Art. XIII.

² Art. IV.

two to seven. But voting, as in the Continental Congress, was by states, and each state had one vote.¹ All functions and powers of the general government were gathered in the hands of this Congress and its committees. As an aid to the transaction of business, the delegates could elect one of their number president. But the person so chosen was only a moderator, or chairman, and had no independent executive powers whatsoever. Congress was itself, indeed, rather an executive than a legislative body. During the intervals between its sessions it could delegate a limited control of affairs to a "committee of the states," composed of one member of Congress from each state; and it could at any time appoint such other committees and civil officers as were considered necessary. But there was no separate executive branch. Likewise, there was no federal judiciary.

CHAP.
VIII

The functions and powers of the general government were, therefore, identical with the functions and powers of Congress; and a fourth feature of the system was the rigid limits set for these powers. The powers conferred were mainly, as has been said, executive in character. Congress was to manage foreign relations, declare and conduct war on land and sea, build and equip a navy, carry on dealings with the Indian tribes, borrow money, emit bills of credit, regulate weights and measures, and issue requisitions upon the states for soldiers and for funds. The grant of these and a few other powers to Congress involved some real concessions on the part of the states, and public sentiment was not as yet prepared to go farther. Measured, however, by the needs that arose, these powers were very inadequate. In the first place, certain powers which are fundamental to all government were not conferred at all. One of these was the power to raise money by taxation. Congress could call upon the states for funds, but only the state legislatures could tax. Another hardly less necessary power which was withheld was that of laying tariff duties and otherwise regulating commerce.

Powers and
limitations

In the second place, most of the important powers conferred could be exercised only with the assent of nine of the thirteen states. This number must agree before war could be declared, treaties concluded, money coined, estimates of expenditures prepared, funds borrowed, or decisions reached on the number of land or sea forces to be raised. A handful of delegates from five states,

¹ If the delegates from a state were equally divided on a question, the vote of the state was lost.

CHAP.
VIIIInherent
weakness

although representing a small minority of the country as a whole, could, therefore, block measures of the most urgent nature.

Furthermore, Congress lacked independent power to enforce its measures. It had no money and no soldiers except such as the states chose to provide; there were no courts, except those of the states, through which it or its agents could compel respect for its authority. It could pass resolutions; but it could not make law, in the proper sense of regulations backed by a power of enforcement. It could make up a list of citizens from which seven or nine arbiters should be designated, partly by lot, to look into disputes between two or more states; but there was no way of enforcing the findings arrived at. It had reasonably broad executive powers; but it could exercise few of them without the consent of nine states, and it could not go far in any direction without the funds which it could only ask, not compel, the states to provide.

The
Articles
put into
effect

In the three and one-half years between the adoption of the Articles by Congress and their ratification by Maryland the country gained a great amount of political experience, most of which went to indicate, in the judgment of such men as Washington and Robert Morris, that the Articles would hardly stand the test of practical use. Indeed, Hamilton and others urged a revision before the experiment was tried. On March 1, 1781, however, the long-suspended frame of government went into operation in the form in which it came from the hands of Congress. The effect was a momentary toning up of the management of public affairs. The new Congress, while not a distinguished body, was superior to its predecessor, and it gave all the force and ability that it had to the performance of its multifold duties. Taking over a plan worked out by the preceding Congress in its expiring moments, it provided for four executive officers, or heads of departments—a superintendent of finance, a secretary of foreign affairs, a secretary "at war," and a secretary of marine; and, though handicapped by lack of funds and of powers, these agencies did some good work and became the prototypes of the ten great executive departments at Washington today.¹ In the teeth of grave obstacles, the new government kept the armies equipped and in the field until peace was assured. It sent astute commissioners who procured from Great Britain full recognition of American independence and beat the

Achievements of
the new
government

¹J. C. Guggenheimer, "The Development of the Executive Departments, 1775-1789," in J. F. Jameson, *Essays in the Constitutional History of the United States* (Boston, 1889), 116-185.

double-faced diplomats of France and Spain at their own game. It took up the question of organizing and developing the territories west of the Alleghanies and adopted principles and measures which underlie the governmental and educational systems of that part of the country today.¹ It held the thirteen jealous states together while the people were gradually being brought by hard experience to see that what they needed was more union rather than less, or, as some had thought, none at all.

CHAP.
VIII

The embarrassments, disorders, and dangers of the years covered by the Confederation—years aptly termed the “critical period”—are described in numerous excellent books;² manifestly the story cannot be told here. The Articles, as many had feared, proved a very unsatisfactory frame of government. Four main difficulties appeared. The first was the lack of power to raise money. Never, perhaps, did a government stand in greater need of generous funds. The cost of the war had been met mainly by domestic and foreign loans; but interest payments were far in arrears, and the public credit threatened to be completely extinguished unless the holders of securities soon received some part of what was due them. The officers and soldiers, who in many cases had received nothing for their services except certificates of indebtedness, were now clamoring for their money. A new army was urgently needed to repel possible British or Spanish attacks and to hold the Indians in check, and a navy to protect American commerce from the depredations of the Barbary pirates. On top of these and other obligations and needs, the current expenses of the new government were to be provided for.

Need of
money

Congress had but two ways of obtaining funds, namely, by borrowing and by making requisitions on the states. The possibilities in the first direction were already nearly exhausted; although optimistic Dutch bankers continued to make small loans which quite possibly saved the country from utter bankruptcy. Requisitions upon the states were likewise extremely unreliable. Congress could apportion sums and request payments, but it had no means of compelling a state to turn over a single penny. The basis of apportionment of quotas among the states, *i.e.*, the value of land and improvements, was considered unjust by large numbers of people. Dislike of sending off the proceeds of local taxation to

Difficulty
of obtain-
ing it

¹ Notably the Northwest Ordinance of 1787.

² Most interestingly in John Fiske, *The Critical Period* (Boston, 1888), although this account is not entirely free from errors of detail.

CHAP.
VIII

a distant government, coupled with a natural hesitation to meet obligations in full while other states were shirking them, strongly disinclined the governments and peoples of the several states to comply with the requests that came to them.

Relief
measures
defeated

The result was that, after a brief period, some states fell into the habit of contributing hardly anything, others paid irregularly, and only two or three—chiefly New York and Pennsylvania—made any real effort to come forward with all that was asked of them. It is not to be wondered at, therefore, that the arrears of interest on the domestic debt increased almost four-fold, and on the foreign debt about twenty-five fold, during the brief period 1784-89; or that the general government found itself without the means of meeting even current expenditures regularly and promptly. In February, 1781, even before the Articles went into effect, Congress asked the states for the power to levy a five per cent import duty. Rhode Island, however, was unwilling, and the proposal failed. Again in 1783 Congress sought permission to levy certain duties, whose proceeds were to be applied exclusively to the public debt. But in three years only nine states gave their consent, and a fresh appeal in 1786 failed to win New York.

Depreci-
ated paper
currency

Nothing was to be gained by issuing paper money. The country was already flooded with paper promises to pay, issued as an aid to financing the war, and this "continental currency" had so depreciated that by 1781 practically the only people willing to accept it were speculators, who bought and sold it in bundles at rates varying from five hundred to one thousand dollars in paper for one dollar in gold. A pound of tea cost a hundred dollars, a yard of linen seventy-five dollars; Jefferson's account-book shows that he paid his physician three thousand dollars for two calls. To make matters worse, the states went on issuing paper with no specie basis whatever. Obviously, it would have been idle to expect new issues of federal notes to be received as real currency.¹

Inability
to regulate
commerce

A second main defect of the system was the lack of power in Congress to regulate commerce. Congress was permitted by the Articles, it is true, to regulate trade with the Indian tribes and to conclude treaties of commerce with foreign nations. But it had no power to control commerce between the states; it could not lay duties on exports or imports; and it was bound to allow

¹ The financial situation in the period is clearly described in A. C. McLaughlin, *The Confederation and the Constitution*, Chap. iv, and more fully in C. J. Bullock, *The Finances of the United States, 1775-1789* (Madison, 1895).

the states to lay duties, and even to prohibit the exportation or importation of goods, as they severally desired. The consequences were disastrous. No money could be raised from tariff duties. No uniform commercial policy could be adopted. The states laid duties, gave privileges, and set up barriers as their own immediate interests dictated, and by their jealousies and bickerings they sacrificed opportunities for the advancement of the country's general trade and wealth. When, for example, three of the New England states practically closed their ports to British shipping in order to bring about a relaxation of certain British commercial restrictions, Connecticut immediately threw her ports wide open to all British vessels. Pennsylvania discriminated against Delaware and New Jersey, and they promptly retaliated; Maryland tried to deflect the commerce of Virginia to her own ports; New York laid ruinous burdens on the trade of her maritime neighbors, New Jersey and Connecticut. Enmeshed in a network of duties and tolls, trade languished; healthy commercial competition gave way to downright commercial warfare.¹

CHAP.
VIII

Lack of power to raise money by direct action and to regulate commerce on uniform lines would have been enough to insure the failure of the new government, even if conditions in other respects had been far more favorable than they were. But coupled with these disadvantages were two other more general and fundamental defects: (1) the government of the Confederation rested upon the states and not upon the people, and (2) it was wholly without power to enforce its authority, even upon the states. From the first circumstance flowed many unhappy results, in addition to the inability that has been mentioned to lay and collect taxes by direct authority. Congress could not make laws and enforce them upon the people; it could only pass resolutions, advise and admonish the state authorities, and hope that the states would carry out its desires. It had no power to raise armed forces independently, even when, as during the Shays rebellion in Massachusetts in 1786, the new order was beset by forces of discontent that were seeking to overthrow it.

A govern-
ment of
states and
not of men

The crowning difficulty was the inability of the general government to compel the states to meet their obligations and, in general, to live up to the terms of the constitution, which they had more or less reluctantly ratified. Not only did they fail to comply

State
infractions
of the
Articles

¹ On the disordered state of commerce under the Articles see A. C. McLaughlin, *op. cit.*, Chap. v, and J. Fiske, *Critical Period*, Chap. iv.

with requisitions for money and for armed forces; they, or some of them, violated the Articles by making treaties with Indian tribes, by entering into alliances among themselves without the assent of Congress, by ignoring obligations created by treaties negotiated by Congress, by (in effect) regulating the value of money through making their paper issues legal tender. Congress was powerless to prevent these infractions by military, judicial, or other means, and its moral authority carried little weight. In the final analysis, the union was, as Madison declared in 1789, nothing more than a treaty of amity, of commerce, and of alliance between independent and sovereign states."¹ It was a failure, Washington tersely remarked, because of the "absence of coercive power."

Early proposals for a revision of the Articles

It has been pointed out that even before the Articles took effect men who had the country's welfare at heart felt that a government so devoid of power could not succeed. The most they could hope for was that a brief trial of the new plan would convince the people of its inadequacy and would lead to the stronger system from which the states at present drew back. In 1780 Hamilton, in a remarkable letter addressed to James Duane and intended for the use of a committee of Congress which was charged with preparing a plan for executive departments, lucidly discussed the Articles' faults and proposed that a general convention be called to prepare a frame of government providing for a "solid coercive union."² Washington, Madison, Jay, Pelatiah Webster, and other leaders repeatedly affirmed that the government would have to be strengthened, and in 1782 the assembly of New York added its voice in favor of a convention.

Consideration of the matter in Congress

When Congress took up its stupendous task, the difficulties that had been predicted promptly appeared; yet its urgent requests for more financial power, and for increased authority in one or two other directions, were refused. These requests involved, indeed, only slight changes in the Articles. But amendments could be adopted only with the assent of all of the states; and one or more states blocked every proposal. Throughout 1784 members of Congress occasionally discussed among themselves the wisdom of calling a convention,³ and in the following year the Massachusetts General Court formally requested that such a call be issued, al-

¹ *Writings* (Hunt's ed.), II, 363. See the trenchant criticism of the Articles contained in this paper.

² *Works* (Lodge's ed.), I, 213-239.

³ *Writings of Madison* (Hunt's ed.), II, 99-100.

though the state's representatives in Congress refused to present the resolution. Matters were fast going from bad to worse, and in 1786 Congress, in making a final appeal for the financial amendment proposed three years earlier, told the people of the states frankly that the government was at the end of its tether and that only immediate action could save the country from ruin. "A crisis has arrived," it was solemnly asserted, "when the people of the United States, by whose will and for whose benefit the federal government was instituted, must decide whether they will support their rank as a nation by maintaining the public faith at home and abroad, or whether, for the want of a timely exertion in establishing a general revenue and thereby giving strength to the Confederacy, they will hazard not only the existence of the Union but of those great and invaluable privileges for which they have so arduously and so honorably contended."

CHAP.
VIII

Meanwhile a chain of events was started which led, more or less accidentally, to the long-talked-about convention. From as far back as 1777 Virginia and Maryland had been trying to arrive at an understanding concerning the navigation of the Potomac. Washington and Madison were especially interested in the matter, and at their instigation Virginia appointed commissioners in 1784 to renew the negotiations. Maryland took similar action in 1875, and an agreement was promptly reached. Maryland thereupon suggested that other issues between the two states be taken up. If navigation questions could be settled by conference, why not tariff difficulties? Furthermore, if two states could confer to advantage, why not four—especially in view of the fact that Pennsylvania and Delaware were vitally concerned in most of the problems to be considered? The upshot was that, in January, 1786, Madison got through the Virginia legislature a resolution appointing commissioners to meet such commissioners as might be appointed by other states to take into consideration the trade of the Union and "to consider how far a uniform system in their commercial regulations may be necessary to their permanent harmony."¹ A formal invitation was thereupon issued to all of the states to send delegates to a convention to be held at Annapolis in the following September.

Virginia
and Mary-
land nego-
tiate on the
navigation
of the
Potomac

At the appointed time representatives appeared from only five states. Four other states had, indeed, appointed delegates, who failed to attend; four states took no notice of the call. This was a discouraging beginning, and it was agreed that it was useless

The
Annapolis
convention
(1786)

¹ *Writings of Madison* (Hunt's ed.), II, 218.

to enter upon the discussions that had been intended. Some members felt that the project might as well be dropped. Madison and Hamilton, however, thought otherwise, and before disbanding the delegates unanimously adopted a report prepared by the latter calling attention afresh to the critical situation of the country and proposing that a convention of delegates, from three to seven in each case, from all of the states should meet at Philadelphia on the second Monday of May, 1787. The purpose, furthermore, was no longer merely to achieve uniformity of commercial regulations. Rather it was "to take into consideration the situation of the United States," with a view to such general reconstruction as would make the government adequate; although the report was discreetly silent upon the amount of change that this might be found to entail.

The Phila-
delphia
convention
called

Congress was by this time grasping at straws, and on February 21, 1787, it resolved that the proposed convention should be held "for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the States, render the federal constitution adequate to the exigencies of government and the preservation of the Union."¹ Congress had itself fallen into disrepute. But the activities of Washington, Madison, Hamilton, Franklin, and others in behalf of the plan gave it weight, and all of the states except Rhode Island eventually followed Virginia's example and named delegates, although New Hampshire failed to act until the convention was well under way. In some cases the legislatures elected, in others they authorized the governors to appoint; in no instance were the delegates chosen directly by the people. Little or nothing was said about making a new constitution. The instructions given the delegates plainly assumed that nothing would be done beyond revising the Articles; indeed, in most cases they expressly limited the delegates' powers to this task, and Delaware went so far as to forbid her representatives to agree to any proposal which would take away the equal votes of the states. If any persons expected a new constitution to be made—and probably some did—they discreetly kept their hopes to themselves, lest apprehensions be aroused and the project ruined. Most observers must, none the less, have felt with Madison that unless "some

¹J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Washington, 1854), I, 120.

very strong props" were applied the existing union would "quickly tumble to the ground."

REFERENCES

- C. Becker, *The Eve of the Revolution* (New Haven, 1918), Chaps. II-IV.
 ———, *The Declaration of Independence* (New York, 1922).
 G. E. Howard, *Preliminaries of the Revolution* (New York, 1905), Chaps. IV-V, XIV-XVI.
 C. H. Van Tyne, *The American Revolution* (New York, 1905), Chaps. IX, XI.
 ———, *The Causes of the War of Independence* (Boston, 1922).
 E. Channing, *History of the United States* (New York, 1912), III, Chaps. I-III, XIV.
 A. M. Schlesinger, *New Viewpoints in American History* (New York, 1923), Chap. VII.
 J. Schouler, *Constitutional Studies* (New York, 1904), 29-69, 79-83.
 C. E. Merriam, *History of American Political Theories* (New York, 1903), Chap. II.
 R. G. Gettell, *History of American Political Thought* (New York, 1928), Chap. IV.
 J. Fiske, *Critical Period of American History* (Boston, 1888), Chaps. III-IV.
 A. C. McLaughlin, "The Background of American Federalism," *Amer. Polit. Sci. Rev.*, XII, 215-240 (May, 1918).
 ———, *The Confederation and the Constitution* (New York, 1905), Chaps. IV-XI.
 W. C. Webster, "A Comparative Study of the State Constitutions of the American Revolution," *Annals of Amer. Acad. of Polit. and Soc. Sci.*, IX, 64-104 (May, 1897).
 E. S. Corwin, "The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention," *Amer. Hist. Rev.*, XXX, 511-536 (Apr., 1925).
 A. W. Small, "The Beginnings of American Nationality," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, VIII, Nos. 1-2 (Baltimore, 1890).
 G. T. Curtis, *Constitutional History of the United States* (New York, 1889), I, Chaps. V-XV.
 J. Story, *Commentaries on the Constitution of the United States* (4th ed., Boston, 1873), I, §§ 218-277.
 R. G. Adams, *The Political Ideas of the American Revolution* (Durham, N. C., 1922).
 H. E. Egerton, *The Causes and Character of the American Revolution* (Oxford, 1923).
 C. H. McIlwain, *The American Revolution; a Constitutional Interpretation* (New York, 1923).
 A. Nevins, *The American States During and After the Revolution* (New York, 1924).
 J. B. Scott, *The United States of America; A Study in International Organization* (New York, 1920).

CHAPTER IX

THE MAKING OF THE CONSTITUTION

Member-
ship of the
Constitu-
tional
Convention

The convention was announced to meet on the second Monday of May. But when that day arrived only a few delegates had appeared in Philadelphia, and since it was useless to begin until a majority of the states were represented, the opening session was delayed until May 25. Much has been written to the general effect that the convention brought together a remarkable group of men; and there is no denying that it did so. The group was notable, however, not for a uniformly high level of statesmanlike ability, but rather for its varied, and therefore broadly representative, character. There were members of great political sagacity: Washington and Madison of Virginia,¹ Franklin and James Wilson of Pennsylvania, Alexander Hamilton of New York, John Dickinson of Delaware, Oliver Ellsworth of Connecticut. There were delegates of fair, but not exceptional, ability: Rufus King of Massachusetts, Gouverneur Morris of Pennsylvania, William Paterson of New Jersey, Edmund Randolph of Virginia, the two Pinckneys of South Carolina. And there were a few members of narrow vision and mediocre talent: Lansing and Yates of New York, and Luther Martin of Maryland. Lawyers predominated; and several of the delegates were reasonably well acquainted, not only with the history of English law and politics, but with the governmental systems of Continental Europe. Men of age and maturity were present, notably Franklin, who was almost eighty-two. But a large proportion of the most active and influential delegates were decidedly young: Madison, the master-builder, was thirty-six, Gouverneur Morris was thirty-five, Hamilton was but thirty.

Experience
and temper
of the
delegates

The convention's chief qualification for its task lay, however, in the fact that almost without exception its members were experienced in public affairs. Practically all of them had been active in the politics of their respective states. Many had helped frame constitutions, sat as members of legislatures, or held executive or

¹Jefferson was on a diplomatic mission in Europe; otherwise he would undoubtedly have been a member.

judicial offices. Several had been members of Congress. At the same time, it is to be observed that they were not the radicals who had had most to do with bringing on the Revolution and with declaring independence. Patrick Henry was not there, nor was Samuel Adams. The men who now held the country's political destinies in their hands were not of the doctrinaire type. Rather, they were hard-headed, practical-minded people—men, in the main, of property and of the conservative temper that goes with the possession of property. Few were as conservative as Hamilton, who wanted to see a highly centralized and somewhat aristocratic republic set up. But there was far less regard for political abstractions than among the earlier preachers of revolution, and doubts about the efficiency of political democracy, which most members held and some openly avowed, left a deep impress on the constitution as it came from the convention's hands.¹

The sessions were held in the old brick State House in Philadelphia, probably in a room directly above that in which the Declaration of Independence was signed. Seventy-three delegates, in all, were appointed, but only fifty-five ever attended; of these, some were present only part of the time, and the average attendance seems to have been not above thirty or thirty-five. At the opening meeting Washington was unanimously chosen to preside. This prevented him from taking an active part in the debates. Indeed, so far as is known, he addressed the convention only twice, on the first and last days of the meeting. With the possible exception of Franklin, he, however, was less dependent on oratory as a means of influence than was any other member. He performed his duties as moderator in a fashion to allay strife, and through informal channels his advice was always available.

The convention had full power to make its own rules. It promptly decided to adhere to the plan of voting by states, each state having one vote, as in Congress; and also to protect the members from outside criticism and pressure by sitting behind closed doors and by allowing nothing that was said to be printed or otherwise made public during the continuance of the sessions. A secretary was appointed, and a journal was kept. When, however, in 1818, this record was printed by order of Congress, it

CHAP.
IXOrganiza-
tion and
procedure

¹ The members are briefly characterized, one by one, in M. Farrand, *The Making of the Constitution*, Chap. II, and their economic interests and political ideas are described in C. A. Beard, *Economic Interpretation of the Constitution*, 74-149, 189-216.

proved to be only a bare enumeration of formal motions and of the votes by states.¹ Happily, one member, sensing the full importance of what was being done, planned to keep a record on his own responsibility. This was Madison. Fragmentary memoranda were left by a few other members, and something can be learned from letters written by certain delegates to their friends. But what we know today about the convention's discussions, as distinguished from its formal actions, comes mainly from the "Notes" laboriously compiled by the methodical Virginian.²

The convention's
main
problem

Deliberations had not gone far before the delegates were brought face to face with a very vital question. Should they merely revise the Articles of Confederation, or should they make a new constitution? There was no getting away from the fact that their instructions looked simply to revision, and that the plan for a convention would have failed had the people of the states suspected that more drastic action would be taken. On the other hand, many thoughtful persons sympathized with Washington when he confessed the hope that the convention would "adopt no temporizing expedients," but would "probe the defects of the constitution [*i.e.*, the Articles] to the bottom and provide a radical cure, whether they are agreed to or not."³ Both points of view were strongly represented in the convention, and a plan based on each was early presented for consideration.

The
Virginia
plan

The first scheme to appear came logically from Virginia. That state had taken the initiative in causing the convention to be held, and its delegates felt themselves under a certain obligation to have a concrete project ready for discussion. The delay in the assembling of a quorum gave them an opportunity to meet together for some days, and it was in these conferences that the "Virginia plan" first took definite form. Madison was its real author (although Edmund Randolph presented it to the convention), and it represented the best thought of the convention's ablest student of political, and especially federal, institutions. The plan did not explicitly repudiate the Articles. But it looked to a thorough reconstruction of the system of government for which they provided, and

¹ For the Journal, see *Documentary History of the Constitution*, I, 48-308.

² First published in 1840. Of several editions, the best are G. Hunt [ed.], *Writings of James Madison* (New York, 1900-10), III-IV, and G. Hunt and J. B. Scott [eds.] *The Debates in the Federal Convention of 1787 which Framed the Constitution of the United States of America* (Internat. ed., New York, 1920).

³ *Writings of Washington* (Ford's ed.), XI, 134.

Vj. Plan

the fiction that a mere revision was intended was soon dropped. ^{CLAP.}
A national executive was to be established, and also a national
judiciary with somewhat limited jurisdiction. There was to be a
legislature in two branches, the members of the first branch being
 chosen by the people of the several states and the members of the
 second branch being selected by those of the first from persons
 nominated by the state legislatures. Voting was to be proportioned
 in both houses, either to the quotas of contribution or to the number
 of free inhabitants, or to both. The legislative powers of Congress
 were to be increased, and the national government was to have the
 right to veto state legislation when considered contrary to the
 Articles or to a treaty, and to call forth the militia against any
 member of the union "failing to fulfill its duty." Presented by
 Randolph on May 29, in the form of fifteen resolutions, this plan
 gave the convention something to go to work upon at once; and for
 two weeks the delegates, sitting in committee of the whole, had it,
 and questions arising out of it, under almost continuous dis-
 cussion.¹

The Virginia plan contemplated a greater change in the ma-
 chinery of the general government than in its powers. Neverthe-
 less it provided for a substantial increase of powers; and it pro-
 posed to substitute proportional for equal voting in Congress.
Strong objection therefore arose from the members who were most
attached to the "rights" of their states; and when the larger part
 of the Virginia plan was tentatively voted in committee of the
 whole, these elements decided to present a counter-plan based on a
 "purely federal" principle. This alternative scheme, embodied in
 nine resolutions, was laid before the convention on June 15 by
 William Paterson, of New Jersey. Far from discarding the Articles,
 as the Virginia plan in effect did, the New Jersey plan looked
 merely to such amendment of them as would serve to remedy the
 most glaring defects of the existing system. There was to be an
 executive in the form of a council chosen by Congress, and a
national judiciary consisting of a "supreme tribunal." Congress
 was to have power to raise money from duties on imports and from
 stamp taxes, and to regulate commerce; and its acts were to be
"the supreme law of the respective states." But the equality of the
 states for governmental purposes was to remain inviolate; Congress

The New
 Jersey
 plan

¹On the same day on which the Virginia plan was presented Charles Pinckney, of South Carolina, offered a plan of his own. It was rather similar to the Virginia scheme and was not discussed in detail by the convention.

CHAP.
IXCompromise the
only
solution

was still to consist of a single house, in which each state should have one vote.

The New Jersey plan was ably advocated by Paterson and other members, and it enlisted the support of about half of the states. Its presentation, indeed, split the convention into two distinct parties, one representing the large states and the other the small states. One group wanted political power proportioned, to the ability of the states to aid in bearing the public burdens, and was not afraid of a real national government; the other held that the states, as sovereigns, were equals, and that to give up the right to equality of governmental power would mean for the small states a total subordination to their more populous neighbors. Fortunately, it was not necessary that either party should have its way at all points; else no conclusions could ever have been arrived at. The delegates were, after all, practical-minded patriots, accustomed in their business relations and in their home politics to the saving principle of give and take. They set forth their widely divergent views on the floor of the convention freely and sometimes acrimoniously. But, having done so, most of them were not averse to compromise; and the constitution upon which they finally came together was, in almost every important clause, a product of mutual concession.

Decision
in favor of
a strong
national
government

Fortunately, however, compromise did not enter in until after certain vital decisions had been reached. The most important of these was to cast aside the Articles and to establish a government resting on a broadly national basis. Some delegates were of the opinion that the instructions given by the states were binding, and that if the convention wanted power beyond the simple revision of the Articles its members ought to go back to their states and ask for it. But the majority were, as Randolph later put it, "not scrupulous on the point of power," and felt, as he further testified, that "when the salvation of the republic was at stake it would be treason to our trust not to propose what we found necessary."¹ Within five days after the opening of the sessions a resolution was adopted in committee of the whole "that a national government ought to be established consisting of a supreme legislative, executive, and judiciary";² and Madison, Hamilton, and other delegates made it perfectly clear that this meant a government embodying one supreme power, with "complete and compulsive operation." The small-state elements protested and declared that they

¹ J. Elliot, *Debates*, V, 197.² *Ibid.*, V, 134.

would have no part in such a union; the large-state delegates asserted that they would accept nothing less. The small-state people brought forward the New Jersey plan; yet at the final test only three states voted for it. From first to last—sometimes at the risk of breaking up the deliberations—the initial decision was wisely adhered to. The time for compromise had not yet come.

From this decision flowed, too, certain great corollaries: (1) the powers of the general government should be decidedly increased; (2) the machinery of government should be enlarged, as indeed was proposed in all of the plans submitted for the convention's consideration; (3) the general government, equally with the state governments, should operate directly on the people, through its own laws, administrative officers, and courts; and (4) the new constitution should be "the supreme law of the land," enforceable in the courts like any other law and paramount as against all other constitutions, laws, and actions, national or state, found to be inconsistent with it. All of these were momentous decisions, and all lie to this day at the basis of our governmental system.

The third decision, in particular, quite transformed the character of the national government. Instead of resting almost solely upon the semi-independent states, and having little control over the people except through the medium of the state authorities, that government now became a government of men, with power to levy and collect taxes and to make and enforce laws by its own direct action. Henceforth, as James Wilson pointed out to the convention, over each citizen there were to be two governments, both "derived from the people," both "meant for the people," and both operating by an independent authority upon the people. It was this aspect of the new system, as Madison subsequently explained in a letter to Jefferson, that made it possible to leave out of the constitution any provision authorizing the national government to call forth the armed forces against a delinquent state.¹ Every one of the principal plans presented to the convention had, in one form or another, proposed coercion of delinquent states. But when it was decided to create a central government that would have power to proceed directly against individual citizens, it was perceived that this opened a way to the desired end through the simple enforcement of law, and made unnecessary a very difficult decision on the form which state coercion should take. Thus it came about that the Civil War was waged on the theory that the object was

The national government to be a "government of men"

¹ *Madison's Letters* (ed. of 1865), I, 344.

CHAP.
IX

to suppress rebellion on the part of citizens, not of states as such; although this distinction was largely lost sight of in the era of Reconstruction.

The great
compromises:1. The
"Connecti-
cut com-
promise"

These fundamentals settled, the large-state party was prepared to make concessions. The first and most notable one related to voting power in Congress. The large states wanted representation and voting power according to population; the small states demanded equality in voting; spokesmen of each group threatened more than once to withdraw unless their wishes were met. At a very critical point in the proceedings the delegates from Connecticut—a middle-sized state which was firmly attached to the idea of a stronger union—brought forward a proposal for equal representation in the upper house, combined with representation on a proportional basis in the lower house; and after heated debates the deadlock was broken and the compromise was adopted, although grudgingly on the part of most of the large-state representatives. This disposition of the matter was suggested early in the proceedings and did not originate with the Connecticut delegation. Dr. Johnson and his colleagues deserve credit, however, for putting it formally before the convention with an array of unanswerable arguments, and the agreement has ever since been properly known as the "Connecticut compromise." It removed the greatest single obstacle to harmony.

2. The
three-fifths
clause

The decision in favor of proportioned representation in the lower house, however, made it necessary to determine how population should be computed. The difficulty at this point was caused by the slaves. Should they be regarded as persons or as chattels? If the one, they ought to be counted in; if the other, they ought to be left out. With a view to increasing their quotas in Congress, the southern states naturally wanted the slaves counted; the northern and middle states, having few slaves, quite as naturally wanted them left out; and much strong-toned discussion ensued. A possible solution was, however, already in men's minds when the convention met. When asking the states for additional funds in 1783 Congress had proposed to change the basis of apportionment from land values to numbers of population, in which three-fifths of the slaves should be counted. This "federal ratio" was early added as an amendment to the Virginia plan; it was embodied in the New Jersey plan; and, notwithstanding individual differences of opinion, it was ultimately adopted by the convention as being, in the words of Rufus King, "the language of all America." There

was no defense for it in logic. But it was the closest approach to a generally satisfactory arrangement that a body of practical-minded men could discover. The slave states received less representation than they thought their due. But they found compensation in the provision that direct taxes laid by Congress should be apportioned on the same reduced basis as representation; although, as a matter of fact, direct taxes were actually employed by the national government only three times before slavery was abolished.

Still another compromise pertained to the powers of Congress over commerce. The states north of the Potomac had large commercial interests, and, having suffered most from the commercial anarchy of the Confederation period, they wanted Congress to have substantial power to regulate trade and navigation. The four states farther south, however, were agricultural, and their delegates feared that Congress would levy export duties on southern products and in other ways discriminate against the non-commercial section. Furthermore, there was the question of the slave trade. The northern states would have been willing to see the traffic abolished immediately, and Maryland and Virginia, being well stocked, had no great interest in it. But Georgia and the Carolinas considered it necessary to their economic development, and the convention was told flatly that these states would never accept the new plan "unless their right to import slaves be untouched." The upshot was an agreement which placated all elements. Congress was to have general powers to regulate navigation and foreign trade, including power to lay duties on imports. But duties on exports were forbidden, and the importation of slaves was not to be interfered with by the national government (except to the extent of a head-tax not exceeding ten dollars) prior to the year 1808.

CHAP.
IX

3. Com-
merce and
the slave
trade

Many other important matters claimed the attention of the delegates through the sultry mid-summer days during which the convention patiently pursued its labors. The nature and powers, and especially the mode of selection, of the executive absorbed much time and thought, the more by reason of the fact that plans gradually took form for a chief executive different from any that the world had ever known. The manner of electing senators—whether by the people, by the state legislatures, or by some agency specially constituted for the purpose—proved very difficult to decide. The appointment and status of the national judiciary provoked ardent discussion. The powers to be vested in Congress, the mode

The
instrument
completed

of admitting new states, the control of the national government over the state militia, the manner of amending the new constitution—these and a score of other matters demanded and received painstaking consideration. From first to last the Virginia plan, and amendments to it, formed the chief basis of discussion. First, the essentials of this plan, as embodied in the Randolph resolutions, were threshed out in committee of the whole. Then, after being reported back to the convention considerably amplified and amended, they were again debated in full. Next, the enlarged and extended resolutions that resulted from this process were turned over, near the close of July, to a committee of detail, which worked them out into a balanced constitutional text; and the convention spent upwards of six weeks more in discussing this draft. Finally, Gouverneur Morris wrote out with his own hand the completed instrument, casting it in the lucid English for which it has ever been notable among great documents; and on September 17 thirty-nine members signed it.¹

The real test was yet to come. The convention had ignored the instructions given most of its members and instead of patching up the Articles had prepared a great organic law on widely different lines. Would the people of the states approve what had been done? Even the members of the convention were not very enthusiastic over their handiwork. Three of those who were present when the document was signed refused to put their names to it. Of the twelve active members who were absent, some hastened to their homes to take up the fight against ratification. Of the men who signed, few, if any, were wholly satisfied: Franklin was optimistic, yet he confessed to misgivings; Hamilton admitted that he signed mainly because he considered that the new frame of government could not prove less satisfactory than the existing one.

Plans for
ratification

In laying the results of its labors before Congress the convention made two significant recommendations. The first was that the proposed constitution should be submitted in each state to a convention chosen by the people, and the second was that steps should be taken to put it into effect whenever as many as nine states should have acted favorably upon it.² The object of the first proposal was, as Hamilton explained, to give the instrument a more popular

¹ The monumental collection of sources on the work of the convention is M. Farrand, *The Records of the Federal Convention*, 3 vols. (New Haven, 1911). The best general account is the same writer's *The Framing of the Constitution of the United States* (New Haven, 1913).

² J. Elliot, *Debates*, V, 541.

basis than would arise from ratification by the state legislatures¹ —a basis similar to that upon which the state constitutions rested except only in Massachusetts and New Hampshire, where there had been a direct popular vote. The purpose of the second proposal was obviously to enable the new system to go into operation when approved by a substantial majority of the states, without waiting for the unanimity which it had taken three and a half years to obtain in the case of the Articles. Without delay or serious protest, Congress accepted both suggestions, and on September 28 the constitution was transmitted to the states for action.

The controversies that had stirred the convention were now brought home to the people; from New England to Georgia the new frame of government was seized upon and discussed, dissected, explained, praised, denounced. Objections arose in many quarters. There were men who, like Patrick Henry and Samuel Adams, were so imbued with the doctrines of liberty that they took instant offense at any proposal looking toward a centralization of authority. On the other hand, some people thought that the new plan did not provide for as much centralization as was needed. The paper-money elements were aroused by the clause which forbade the states to emit bills of credit. Many people in the North considered that too much was conceded to the slave-holding interests; many in the South felt that these interests had been dealt with unfairly. Large inland elements—small farmers, backwoodsmen, pioneers—feared the effects of the commercial powers given to Congress; men of property, although generally favorable, wondered how freely the new taxing powers would be used.² Everywhere the complaint was made, and justly, that the instrument failed to take any notice of those fundamental rights and liberties—freedom of speech, freedom of the press, freedom of assembly, the right of petition, and religious liberty—which had been so carefully guaranteed in the bills of rights prefixed to most of the state constitutions.³ No single group of objections was dangerous alone, but in most states the several groups tended to merge into an opposition extremely difficult to convert or to overcome. The advo-

CHAP.
IXPrincipal
objections
raised

¹ *The Federalist*, No. xxii (Lodge's ed., 135).

² On the controlling influence of the professional and propertied classes in making and adopting the constitution see C. A. Beard, *Economic Interpretation of the Constitution* (New York, 1913), and O. G. Libby, *Geographical Distribution of the Vote of the Thirteen States on the Federal Constitution* (Madison, 1894).

³ For contemporary writings voicing the arguments of the instrument's opponents see P. L. Ford, *Pamphlets on the Constitution of the United States, Published during its Discussion by the People, 1787-1788* (Brooklyn, 1888).

cates of the new plan gained the name of Federalists, *i.e.*, people who favored union and federal government; the opponents were called Anti-Federalists. Though not organized nationally, both elements took on characteristics which we commonly associate with political parties.

In the Philadelphia convention the most determined opposition had come from the small states. The conclusions reached there were, however, on the whole favorable to these states, which accordingly became the first to ratify. Delaware "came under the federal roof," as the phrase ran, on December 7, 1787; New Jersey, on December 18; Georgia on January 2, 1788, and Connecticut one week later. Pennsylvania, although a large state, was centrally located and federally inclined, and its convention ratified early, *i.e.*, December 12. This rapid pace, however, could not be maintained. In Massachusetts, Virginia, New York, and other states time was required to rally support, and while there was never much doubt that as many as nine states would eventually ratify, there was grave danger that one or more of the states which, by reason of their location and strength, were practically indispensable to the proposed union would remain obdurate. By cleverly appeasing Samuel Adams and John Hancock, to whom the Anti-Federalists of the interior looked for leadership, the supporters of the new system won in Massachusetts, February 7, 1788, although by a close vote and only after agreeing to a series of suggested amendments aimed at reducing the power of the central government. Between April and June, Maryland, South Carolina, and New Hampshire followed, each after a hard contest. This brought up the number to the required nine. But no one supposed that the new government could be successfully inaugurated on this minimum basis. Even after Virginia, following a peculiarly bitter fight in which Patrick Henry led the irreconcilables, gave a favorable decision, the battle was but half won; New York was still outside, and New York was a pivotal state without which the union would be a mere caricature.

Moreover, the opposition in New York, especially in the rural sections, was very formidable. Appreciating this fact, the friends of the constitution made a special effort before the state convention met to convince the people that the instrument was a moderate, safe, workable plan of government. The most active champion was Hamilton, who conceived the idea of printing in the leading newspapers of the state a systematic exposition in the form of a series of brief public letters, and who associated with himself for the

purpose another able New York Federalist, John Jay, and also the most convincing expounder outside of New York, namely, Madison. The result was the remarkable group of papers, eighty-five in number, known to students of American history from that day to this as *The Federalist*. These papers were signed "Publius," and in a few cases it is impossible to tell which of the three contributors was the author. But Hamilton is known to have written upwards of sixty, Madison about fifteen, and Jay a half-dozen. A few were written by Hamilton and Madison jointly. The letters were prepared in haste and published, at the rate of three or four a week, as campaign documents. But their authors were full of their subject and knew how to write, and, taken as a group, these papers have never been surpassed as examples of lucid, direct, and convincing exposition. Gathered in book form even before the series was finished, the collection has passed through more than thirty editions.¹ Better than anything else, it shows what the constitution meant to the men who made it.

Whether because they were won over by "Publius" or because they were unwilling to see their state remain out of the union after all but two of the others had joined, the members of the New York convention finally ratified, July 26, although by a margin of only three votes. Meanwhile, on July 2, it was officially announced in Congress that the ninth state had ratified, and attention was turned to preparations for putting the new government into operation. The states were called upon to choose presidential electors, senators, and congressmen, and New York City was selected as the temporary seat of government. Then the old Congress, expiring prematurely for lack of a quorum, disappeared, leaving the field clear for its successor. The new House of Representatives was organized on April 2, 1789; the Senate came together three days later; and on April 30 Washington took the oath of office as president. Seven months afterwards North Carolina, won over by the decision of Congress to submit a bill of rights in the form of ten constitutional amendments, ratified the new fundamental law; and similar action by Rhode Island in the spring of 1790 made the union complete.²

CHAP.
IX

The constitution
put into
effect

¹ The title of the first edition was *The Federalist; a Collection of Essays Written in Favor of the New Constitution* (New York, 1788). The best editions for present use are those of H. C. Lodge (New York, 1888) and P. L. Ford (New York, 1898). See F. S. Oliver, *Alexander Hamilton*, 165-179.

² The launching of the new government is described in J. S. Bassett, *The Federalist System*, Chap. 1.

CHAP.
IXCharacter-
istics of
the instru-
ment

"This paper," wrote Robert Morris in commending the constitution to a friend, "has been the subject of infinite investigation, disputation, and declamation. While some have boasted it as a work from Heaven, others have given it a less righteous origin. I have many reasons to believe that it is the work of plain honest men, and such, I think, it will appear." Herein is to be found the reason why the instrument, once adopted, succeeded beyond the hopes of its most ardent supporters. First, it was a brief and simple document. Even with the nineteen amendments that have been added, it fills not above twenty pages of print, and one can read it through in about the same number of minutes. It is shorter than the constitution of any other nation except France, or of any one of the forty-eight states of the Union. Its arrangement is not wholly logical, but nothing is sacrificed on that account. Following a brief preamble, three main articles are devoted to the legislative, executive, and judicial branches, respectively. Four lesser articles deal, in order, with the position of the states, the modes of amending the constitution, the supremacy of national power, and the state ratifications requisite for putting the instrument into effect. Finally come the amendments, which are not, as in the constitution of Switzerland, inserted at appropriate points in the body of the text, but are appended at the end and numbered serially.

Room for
differences
of inter-
pretation

Thanks to the committee of detail, and especially to Gouverneur Morris, the language of the original instrument is clear, direct, and concise; there is not an unnecessary word or an intentionally ambiguous phrase.¹ Some clauses lend themselves, it is true, to varied interpretations, for example that authorizing Congress to "regulate commerce . . . among the several states;" and the conflicts and decisions arising from this source make up a considerable part of the country's constitutional history in the past hundred and twenty-five years. Nevertheless, our greatest constitutional controversies have risen rather from omissions than from provisions of doubtful meaning. In part, these omissions are accounted for by the impossibility of foreseeing certain contingencies, *e.g.*, the introduction of steam-power and of electricity, which have put a new aspect on the work of government. But in

¹ The ablest foreign writer on American government says that the instrument "ranks above every other written constitution for the intrinsic excellence of its scheme, its adaptation to the circumstances of the people, the simplicity, brevity, and precision of its language, its judicious mixture of definiteness in principle with elasticity in details." J. Bryce, *American Commonwealth* (4th ed., 1910), I, 28.

part they arose also from the unwillingness of the constitution's makers to jeopardize their work by forcing a decision on delicate matters which it was possible to pass over in silence. Could a state, by its own volition, withdraw from the new union? The constitution did not say. It could be plausibly argued that the union was to be permanent and that no member had a right to secede. On the other hand, the "sovereignty" of the states was nowhere expressly denied, and the thrice-repeated assertion of the Articles that the union was to be permanent found no place in the new instrument. The matter was glossed over, not because members like Madison and Hamilton were unmindful of it, but because it was inexpedient to press it when the preservation of a central government of any kind was hanging in the balance. The "plain honest men" of whom Morris wrote were bent on an immediate practical remedy of the defects of the existing government, not on making a constitution which would be an ideally logical, comprehensive, and definitive document.

CHAP.
IX

It follows that the fathers did not go out of their way to invent new political forms. Nor did they borrow far afield. Some of them were students of Vattel, Montesquieu, and other Continental writers; some had read history and could cite the failures of ancient confederacies or draw illustrations from the experiences of France and other Continental states. But, as one writer has observed, this knowledge taught them rather what to avoid than what to adopt; and in so far as they drew upon European sources at all, those sources were the common law, the principles of *Magna Carta* and the Bill of Rights, the teachings of Locke and Blackstone, and other characteristic products of their English motherland. This rich heritage, however, had passed to America far back in colonial times and was deeply embedded in the constitutions, laws, and political usages of the states when the national constitution was made. That instrument, accordingly, was based directly upon the political experience of the Americans themselves in the Colonial and Revolutionary periods. The object—let it be repeated—of those who framed and adopted the new organic law was merely to correct specific defects of the Articles of Confederation; and they found it entirely possible to do this without going far outside the range of their own political resources.¹

Sources of
the con-
stitution

¹ "The constitution is simply an application of the experience of Americans in the work of government. . . . With the exception of the method of electing the president, there is not a clause . . . which cannot be traced back to English statutes of liberty, colonial charters, state constitutions, the Arti-

REFERENCES

- A. C. McLaughlin, *The Confederation and the Constitution* (New York, 1905), Chaps. XII-XVIII.
- C. A. Beard, *Economic Interpretation of the Constitution* (New York, 1913), Chaps. III-XI.
- A. M. Schlesinger, *New Viewpoints in American History* (New York, 1923), Chap. VIII.
- F. S. Oliver, *Alexander Hamilton; an Essay on American Union* (new ed., New York, 1923), 83-179.
- H. C. Lodge, *The Democracy of the Constitution* (New York, 1915), Chap. II.
- J. H. Robinson, "The Original and Derived Features of the Constitution," *Annals Amer. Acad. Polit. and Soc. Sci.*, I, 202-243 (Oct., 1890).
- W. S. Carpenter, "The Separation of Powers in the Eighteenth Century," *Amer. Polit. Sci. Rev.*, XXII, 32-44 (Feb., 1928).
- , *Democracy and Representation* (Princeton, 1925).
- M. Farrand, *The Framing of the Constitution* (New Haven, 1913).
- [ed.], *The Records of the Federal Convention*, 3 vols. (New Haven, 1911).
- C. E. Stevens, *Sources of the Constitution of the United States* (New York, 1894).
- E. G. Bourne, "The Use of History Made by the Framers of the Constitution," *Amer. Hist. Assoc. Report for 1896*, I, 221-230.
- W. M. Meigs, *The Growth of the Constitution in the Federal Convention of 1787* (Philadelphia, 1900).
- O. G. Libby, *Geographical Distribution of the Vote of the Thirteen States on the Federal Constitution* (Madison, 1894).
- J. B. McMaster and F. D. Stone, *Pennsylvania and the Federal Constitution, 1787-1788* (Lancaster, 1888).
- S. B. Harding, *The Contest over the Ratification of the Federal Constitution in the State of Massachusetts* (New York, 1896).
- C. E. Miner, *The Ratification of the Constitution by the State of New York* (New York, 1921).
- S. G. Fisher, *The Evolution of the Constitution of the United States* (Philadelphia, 1900).
- B. Long, *The Genesis of the Constitution of the United States* (New York, 1925).
- R. L. Schuyler, *The Constitution of the United States; an Historical Survey of its Formation* (New York, 1923).
- J. F. Jameson, "Studies in the History of the Federal Convention of 1787," *Amer. Hist. Assoc. Report* (1902), I, 89-167.
- G. Hunt and J. B. Scott [eds.], *The Debates in the Federal Convention of 1787 which Framed the Constitution of the United States of America* (New York, 1920).
- J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution . . .* 5 vols. (2nd ed., Washington, 1854).
- cles of Confederation, votes of Congress, or the unwritten practice of some of these forms of government." A. B. Hart, *National Ideals Historically Traced*, 138-139.

2. THE CONSTITUTIONAL SYSTEM

CHAPTER X

THE NATION¹ AND ITS POWERS

For upwards of a century and a half the constitution devised at Philadelphia in 1787 has formed the basis of our governmental system, and it is today the oldest written instrument of government in operation in any independent country. The remainder of this book will be devoted to a description of the governments—national, state, and local—for which it directly or indirectly provides. Before taking up any one of these governments as such it is necessary, however, to give careful attention to several aspects of the system considered as a whole. What is the nature of the union of the states? To what extent is the government unitary and to what extent federal? How are the powers of government defined, and on what lines are they distributed between the nation and the states? What are the rights and duties of the states in their dealings with one another? Who are citizens? What are a citizen's rights, and how are they protected by nation and by state? Along what principal lines, and with what results, has the constitution, and the governmental system based on it, developed since 1789? What further changes are being urged at the present day, and with what prospect of success?

Some fundamental questions about the general scheme of government

One thing, above all others, the makers of the constitution were bound to do, namely, to keep a place for the states as integral units in the new governmental system; and any study of the frame of government that resulted must start from the salient fact that, notwithstanding the creation of a new and stronger national government, the states passed over from the old régime into the new with their names, boundaries, and distinctive features unchanged and with functions and powers diminished but by no means de-

Perpetuation of the states

¹It would be technically more accurate (see p. 12), but also both pedantic and confusing, to employ the term *state*, rather than *nation*, when referring to the United States as a political unit or entity. "Nation" will therefore hereafter be used.

CHAP.

X

stroyed. The constitution extended to eleven states when it first took effect, and to thirteen when the work of ratification was complete. Furthermore, it authorized Congress to admit new states into the Union; and from 1791 onwards this power was used, as the western country filled with population, until in 1912 the admission of New Mexico and Arizona brought up the number to the present total of forty-eight.

Did the
states
remain
sovereign?

X When one takes up the study of any federal plan of government the first question that presents itself is that of the constitutional relations existing between the government of the nation on the one hand and the governments of the federated states on the other. In the case of the United States the problem really goes deeper than this; at all events it has done so historically. For in this country there was a long and bitter dispute, not simply upon the division of the powers of government, but upon the character of the union itself—as to whether, indeed, the United States was really a nation at all, or only, as before 1789, a league of sovereign states. Everybody recognized that the states were not mere administrative areas like the French departments, or even subordinate governmental areas with a limited autonomy conferred by the central government as are the English counties; they were conceded to be distinct, original, indestructible political entities, with extensive inherent powers. But did this mean that they were sovereign? Or were their people so merged in a common, superior, national political organization that the states as such had become subordinate, almost incidental, parts of the general system?

X The “states’
rights”
argument

The states’ rights school took the first view, the nationalist school the second. Starting with the familiar idea of the Revolutionary period that society is the result of contract and that government rests, as Jefferson put it, on “the consent of the governed,” the states’ rights forces, long and ably led by John C. Calhoun, developed a body of doctrine somewhat as follows: (1) the colonies, upon winning independence from Great Britain, became independent, sovereign states; (2) these states entered into a league under the Articles of Confederation without in any wise sacrificing their sovereignty; (3) the constitution was, similarly, a compact among independent political entities, conferring larger power, it is true, upon the central government, yet not altering the basis or character of the union; (4) any state had a right to withdraw from the Union if it considered that the terms of the compact were being violated by the co-states or by the government which they had set

up as their joint agent.¹ It had been a common view that sovereignty under the constitution was divided between the states and the United States. But Calhoun, contending that sovereignty is by its nature indivisible, assigned it exclusively to the states.

CHAP.
X

The nationalist school, growing ever more doubtful about the whole contract theory of society and government, put a very different interpretation on the constitution and the intentions of its framers. As forcefully presented by Webster in his speeches in reply to Hayne in 1830, and by Joseph Story in his *Commentaries on the Constitution*, published in 1833, the nationalist argument was, in general, this: (1) the constitution was established, not by states, but by the people of the United States; (2) sovereignty—which the nationalists, agreeing with Calhoun, said was indivisible—was lodged, not in the states, nor yet in the central government as such, but in the people as a single aggregate; (3) the union is indestructible, in the sense that, being a union of people, and not of states, it can be overthrown or changed only by exercise of the ultimate right of revolution or by other action taken, not by states as such, but by the general body politic. “It is, sir, the people’s constitution,” declared Webster in his second speech in the debate of 1830, “made for the people, made by the people, and answerable to the people. The people of the United States have declared that this constitution shall be the supreme law.”² It was the common nationalist view that the states were at no time in their existence really independent and sovereign; although some writers and debaters preferred not to go into that question, but rather to argue that, whether or not the states had formerly been sovereign, the constitution was not their handiwork and the sovereign authority behind it was the people.

The
nationalist
argument

Considered in the light of contemporary evidence, the nationalist theory presents some serious difficulties. In the first place, the states in the Confederation period habitually spoke of themselves in their public documents as “sovereign;” there is overwhelming testimony that the people everywhere regarded them as such; Madison and Hamilton, and Webster himself, conceded the point; and no difference of opinion on the matter seems to have risen before 1830. In the second place, it is almost equally clear that when the constitution was adopted the people regarded it as a contract

Strength
and weak-
ness of the
arguments

¹A. C. McLaughlin, “Social Contract and Constitutional Construction,” *Amer. Hist. Rev.*, V, 467-490 (Apr., 1900), and *The Courts, the Constitution, and Parties* (Chicago, 1912), Chap. iv.

²*Works of Daniel Webster* (5th ed.), III, 321.

among the states. The instrument itself provided for its establishment *between the states* ratifying it; and at one point in *The Federalist* Madison expressly says that the "assent and ratification" provided for "is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent states to which they respectively belong," and that the act establishing the constitution was, therefore, to be "not a national but a federal act."¹

There is, however, evidence pointing in the opposite direction. First, there is the negative circumstance that nowhere in the debates in the federal and state conventions, or in the pamphlets circulated to influence public opinion on the question of ratification, was the right of secession ever once asserted; on the contrary, affirmations that when the states had once entered the new union they could not withdraw repeatedly passed unchallenged. Ratification would doubtless have been opposed less strenuously had it been considered that a state could secede at will. It is significant, too, that the constitution was ratified and made effective, not by Congress, nor yet by the state legislatures, as it might very well have been, but by conventions made up of persons specially chosen by the people. It could therefore be plausibly argued that the people stood back of the new fundamental law in each particular state, even though they were not regarded as doing so as a single body politic throughout the country as a whole. Not to be overlooked, too, is the oft-quoted sentence with which the constitution opens: "We, the people of the United States, in order to form a more perfect union, . . . do ordain and establish this Constitution. . . ." Even though understood at the time to be rather a preliminary euphemistic flourish than a sober statement of legal fact, this assertion of the preamble is not without some significance.

The most careful survey of the evidence that can be made brings one to substantially the following conclusions. (1) The framers of the constitution and the men who took part in the debates upon it were not bent on carrying out some clear-cut, consistent theory. "The Americans," says Bryce, "had no theory of the state and felt no need for one, being content, like the English, to base their constitutional ideas upon law and history."² They were opportunists, looking only to the solution of imme-

Conclu-
sions that
may be
reached

¹No. XXXIX (Lodge's ed.), 236.

²*American Commonwealth* (3rd ed.), II, 535.

diated difficulties in a purely practical way. (2) Along with much belief in the contractual nature of the new union went a widely shared conviction that a national state, under which no rights of nullification or secession would exist, was being set up. "To be sure, these two views are, and were, logically contradictory, and had the people of that time been political logicians, they would not have been able to accept them both. But this does not militate against the fact that, in truth, they did accept them both."¹ (3) To the fathers the idea of divided sovereignty presented no difficulty. They were content to think of the new central government as sovereign in respect to all powers delegated to it and the states as sovereign in everything else. The Supreme Court took this view in the case of *Chisholm v. Georgia* in 1792, and in a long line of subsequent decisions; Madison expounded it in many of his writings; the older states' rights school fully accepted it; not until the generation to which Calhoun and Webster belonged came on the political stage was the notion discredited. (4) When pushed to say where the ultimate controlling authority lay, the fathers replied "with the people."² But they did not undertake to say whether this meant the citizen bodies of the thirteen states, severally considered, or the people of the country as a whole, considered without relation to state lines. Instead of giving any definite answer to the question of the final location of sovereignty, they, as one writer has remarked, "merely pushed the problem one step further back and there left it as undetermined as before."

Happily, the logic of events has gone far toward clearing up these abstruse and debatable matters. Taken as a whole, the trend since 1789 has been decidedly in the direction of a strong national government based on an indissoluble union of the states. In a remarkable series of decisions in cases turning on constitutional questions, the Supreme Court, notably during John Marshall's long service as chief justice, consistently threw its influence on the nationalist side. The denial and total extinction of the alleged right of a state to nullify acts of Congress, notwithstanding momentary successes of nullificationists in South Carolina and Georgia, worked to the same end. And—passing over a great number of other important factors—the failure of secession in 1860-65, and the general acceptance of the doctrine that a state

CHAP.

X

Historical
triumph
of the
nationalist
view

¹ W. W. Willoughby, *The American Constitutional System*, 23.

² For example, James Wilson's argument in the Pennsylvania convention. J. Elliot, *Debates*, II, 504.

CHAP.
X

Where is
sovereignty
lodged?

cannot secede, clinched the victory of nationalism and stamped the union with the character which, whatever the intentions of the founders, it unmistakably bears in our own day.

Technically considered, the matter of sovereignty is still somewhat obscure. It has been said in a former chapter that the test of sovereignty is the right to alter the form of government by changing the constitution or making a new one; whoever has that right is really sovereign, regardless of forms or appearances. By its own terms, the national constitution, as we shall see, can be amended in either of two ways: by a two-thirds vote in both houses of Congress, followed by ratification by the legislatures of three-fourths of the states, or by the action of a convention called at the request of two-thirds of the state legislatures, with subsequent ratifications by three-fourths of them. The people do not act directly upon amendments at any stage. Nevertheless, it is not the central government that amends, nor is it the state governments. It is, rather, a combination of national and state bodies elected by the people, acting for the people, and subject, in the long run, to full popular control. If the people object to a sovereign act performed in their name they have a means, through the use of the electoral power, of causing it to be undone. The authority that stands back of the constitution and gives it sanction is, therefore, the people; and it is the people, not of Massachusetts and Virginia and Ohio, but of the United States. Sovereignty is undivided, and whatever may have been the case in earlier times, it belongs to the people of the nation considered as a single body politic; they, and they only, have the power to say the last word regarding the form and character of the government under which they live.

The
people
ultimately
sovereign

The thing that is divided under our system is not sovereignty itself, but the actual day-by-day application, or use, of sovereign powers. For obvious reasons, the sovereign people cannot, in the mass, execute laws or render judgments in civil or criminal cases. They can, and in several states do, legislate, through the medium of the popular initiative and referendum; although nowhere in this country do they undertake to perform the whole task of law-making in this first-hand, direct manner. What happens, therefore, is that they entrust the exercise of portions of their sovereign authority—executive, legislative, and judicial—to agents which we know as the national and state governments. And, aside from making provision for the structure of the national government, the constitution of the United States is devoted mainly to drawing

boundary lines between the powers which the national and state governments respectively wield. CHAP. X

✕ Three or four fundamental facts about this distribution of powers are to be specially noted. The first is that the national government has only delegated, "enumerated," powers. Express grants of power are made to Congress, to the president, to the courts; and thereupon it is stipulated, in the Tenth Amendment, that "all powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." We shall see that as a result of experience, legislation, and judicial interpretation the powers wielded nowadays by the national government are immeasurably greater than in the times of Washington and Jefferson. Legally, however, the increases—except in so far as specifically authorized by constitutional amendments—have come exclusively through broader and minuter applications of powers already possessed. Presumably they have added nothing really new; for the government at Washington can, constitutionally, exercise no powers except those given it in the fundamental law.

✕ A second principle, already suggested, is that the state governments, on the other hand, have powers that are original, inherent, and largely undefined. A certain number of powers belonging to state governments are, it is true, mentioned in the national constitution. But there is no attempt to present any comprehensive, complete list. Carrying over into the new system the great bulk of powers which they had possessed under the old one—and they would never have ratified the constitution unless permitted to do this—the original states have ever afterwards enjoyed the full and undefined sweep of powers guaranteed in the Tenth Amendment quoted above. And of course, under the principle of state equality, all states subsequently admitted to the Union are entitled to a similar sweep of authority.

✕ A third fact is that no government under the American system has unlimited powers. In Great Britain, the unitary national government is legally omnipotent. Parliament, as its supreme organ, can amend the constitution, alter or abolish the local government areas, and legislate on any subject and in any fashion at will; and there is no court or other agency with power to pronounce a parliamentary act unconstitutional, and therefore unenforceable. It is quite otherwise in the United States. The national government has only the powers delegated to it; the state governments,

Nature
of the
distribution
of powers

CHAP.
X

while enjoying wider latitude, are hedged about by restraints, imposed in both the national and state constitutions; and, as we shall see, measures enacted by either Congress or state legislatures in excess of their proper powers are practically certain sooner or later to be rendered null and void by action of the courts.

Powers
retained
by the
people

- ✕ From this it follows that by no means *all* power has been entrusted by the people to governmental agencies; on the contrary, great blocks of power have been kept in the people's own hands.
- ✕ Powers not delegated to the national government, nor prohibited to the states, says the Tenth Amendment, are reserved to the states respectively *or to the people*. The enumeration in the constitution of certain rights, says the Ninth Amendment, shall not be construed to deny or disparage others retained *by the people*. And not only are these general guarantees laid down; the national constitution imposes numerous specific restrictions designed to protect the individual, in both his person and his property, against the national government,¹ many others designed similarly to protect him against any state government, and several designed to protect him against both national and state governments. The constitution thus creates—or, better, recognizes—a system of private rights against all governmental interference. “It provides for each person ‘a sphere of anarchy’—of no government—so to speak, within which he may act without any intervention on the part of public officials.”²

- ✕ Under the foregoing conditions, the distribution made in the constitution works out in such a way as to produce three great groups of powers that are conferred or recognized, and three groups that are partially or totally prohibited. These are as follows:

Powers
recognized
or con-
ferred

1. *Powers vested in the national government exclusively.* These are named in the constitution and are meant to be powers which are primarily political in character, which touch the interest of the people generally, and which by their nature need to be exercised by a single authority. They are particularly the powers which the hard experience of the Confederation had taught should be vested in the national government. Examples that come readily to mind are the management of foreign relations, the control of foreign and interstate commerce, the declaration and conduct of

¹ Contained mainly in Art. I, § 9, and Amendments I-VIII.

² C. A. Beard, *American Government and Politics* (4th ed.), 102. See pp. 167-173 below.

war, treaty-making, coinage, and the regulation of weights and measures. CHAP.
X

× 2. *Powers reserved to the state governments exclusively.*

Under the Tenth Amendment, quoted above, these include all powers of government whatsoever which are not delegated to the United States and at the same time are not prohibited to the states. They are "reserved" powers, in the sense of powers remaining after some were delegated to the national government. As has been explained, they are not enumerated in the constitution, but are rather to be determined by process of elimination, as applied under the terms of the Tenth Amendment. Important illustrations are the regulation of both civil and criminal law and the exercise—in the main, at all events—of the "police power."

3. *Powers exercisable by both national and state governments.*

These include, chiefly, powers which the state authorities were accustomed to exercise before 1789, and which, without being withdrawn from the state governments, were conferred on the national government as well. In the main, these concurrent powers are such as, in the nature of things, both governments must be permitted to exercise, *e.g.*, taxation, the encouragement of arts and manufactures, and the promotion of education.

4. *Powers forbidden to the national government.* In theory, it was unnecessary for the fathers to prohibit the national government from doing certain things, because under the constitution this government has, in any case, only such powers as are conferred upon it. Nevertheless, the framers understood that differences of interpretation were likely to arise, and as a matter of fact the new government was hardly installed before such differences plunged the country into violent political controversy. Certain prohibitions, therefore, found a place in the constitution as originally adopted; for example, no tax may be laid on exports, and no capitation or other direct tax may be levied except in proportion to population. The original instrument, however, fell far short of popular desire in this direction, and of the ten amendments adopted in 1789-91 eight directly, and the other two indirectly, put the national government under further specific restraints. In this way Congress was forbidden to make any law abridging the freedom of speech or of the press; the fundamental principle was laid down that no person may be deprived of life, liberty, or property "without due process of law;" and it was prescribed that

Powers
partially
or totally
prohibited

excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

5. *Powers forbidden to the states.* Certain powers, as being either inherently objectionable or inimical to national unity, are forbidden to the states unconditionally; for example, making treaties and alliances, coining money, emitting bills of credit, and granting letters of marque and reprisal. Certain other powers may be exercised only with the consent of Congress; for example, laying duties on imports or exports (except in so far as necessary for the enforcement of inspection laws), laying tonnage duties, keeping troops or ships of war in time of peace, and engaging in war "unless actually invaded or in such imminent danger as will not admit of delay."

6. *Powers forbidden to both national and state governments.* As is observed by Bryce, "there are things in America which there exists no organized and permanent authority capable of legally doing: not a state, because it is expressly forbidden; not the national government, because it either has not received the competence or has been expressly forbidden."¹ Thus, neither a state nor the United States can pass a bill of attainder or an ex post facto law; neither can grant a title of nobility; the national government is expressly forbidden to take private property for public use without just compensation, and judicial construction, developed in a long line of cases, applies the same rule to the states; the Fifteenth Amendment forbids nation and states alike to deny or abridge the right of citizens of the United States to vote "on account of race, color, or previous condition of servitude," and the Nineteenth forbids similar discrimination "on account of sex."

The
question
of implied
powers

The careful wording of the national constitution did not prevent—no phraseology could have prevented—differences of opinion from arising as to the limits of power of both the national and state governments. The issue was forced very early. In 1790 Hamilton proposed as part of his plan for the financial rehabilitation of the country the establishment of a national bank. Opponents of centralization immediately objected that the constitution, in enumerating the powers of Congress, said nothing about a bank. Hamilton and those who supported his policy replied that while the constitution did not, indeed, authorize Congress in so many words to create a bank, the power was to be implied from certain

¹ *American Commonwealth* (4th ed., 1910), I, 315.

grants of authority which were explicitly made. The bank was established, but views upon it were not harmonized; and from this beginning the issue of "implied powers" broadened out until it became the most fundamental and contentious, aside from the question of the indissolubility of the Union, in the entire history of the country.

Led by Jefferson, the strict constructionists argued that the national government had no powers except such as were expressly delegated to it in the constitution, or, at the most, such as could be shown to be indispensably involved in the exercise of these express powers. To take a single step, urged Jefferson in a letter in which he gave Washington his views on the constitutionality of the proposed bank, beyond the boundaries "specially drawn" around the powers of Congress by the Tenth Amendment "is to take possession of a boundless field of power, no longer susceptible of any definition."¹ On the other hand, the loose, or broad, constructionists contended that the national government had all powers which could by any reasonable interpretation be regarded as implied in the letter of the granted powers, and also that it had a right to choose the manner and means of performing its work, even though this meant to use agencies which were not essential for its purposes. "There are express and implied powers," wrote Hamilton in the opinion which he rendered Washington on the bank question, "and the latter are as effectually delegated as the former. . . . The only question, then, is this: Has the means to be employed any natural relation to any of the acknowledged, lawful *ends* of the government? The test of constitutionality lies in the *end* sought. Is the *end* included in the expressed powers? If it is so included, the means requisite and fairly applicable are constitutional."²

On grounds of pure theory, Jefferson's argument was logical; and events proved him right in predicting that the doctrine of implied powers, once admitted, would lead to never-ending absorption by the national government of powers originally considered as belonging to the states. The logic of practical necessity lay, however, with the Hamiltonian view. If the national government was to be really effective, it must exercise implied powers; only by so doing could it meet perplexing contingencies that presented themselves in steady succession. This was finally admitted, although

CHAP.
X

Practical
necessity
of implied
powers

¹ *Writings* (Ford's ed.), V, 284.

² *Works* (Lodge's ed.), III, 449-450.

CHAP.

X

grudgingly, by the Jeffersonians themselves, and when they came into control, in 1801, they proceeded to wield implied powers almost as freely as had their Federalist rivals. On no other basis—to mention but two illustrations—could Louisiana have been annexed in 1803 or an embargo laid on foreign trade in 1807. In the great series of nationalizing decisions between 1809 and 1835, referred to above, the Supreme Court gave the weight of its authority to the doctrine, while yet laying down limits beyond which the principle could not constitutionally be carried.

Chief
Justice
Marshall
on implied
powers

The classic statement of the Court's views was made by Chief Justice Marshall in the case of *McCulloch v. Maryland* in 1819 as follows: "This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising and will probably continue to arise as long as our system shall exist. . . . The powers of the government are limited, and its powers are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in a manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the constitution, are constitutional."¹ This principle firmly established itself and is today a leading feature of our constitutional law; although it should be added that there has been a tendency, especially in the past twenty years, to stretch it so as to make it cover a far wider range of subjects than Marshall contemplated.²

The
supremacy
of the
national
government

One other salient feature of the federal system is the complete control of the national government within the sphere thus marked out for it. This is secured mainly by a clause of the constitution which reads as follows: "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority

¹ 4 Wheaton, 316; R. E. Cushman, *Leading Constitutional Decisions*, 7-20.

² For comment and illustrations see especially Chaps. XIII, XX, XXVII-XXIX.

of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”¹ “This clause,” comments an able writer, “may be called the central clause of the constitution, because without it the whole system would be unwieldy, if not impracticable. Draw out this particular bolt, and the machinery falls to pieces. In these words the constitution is plainly made not merely a declaration, a manifesto, dependent for its life and usefulness on the passing will of statesmen or of people, but a fundamental law, enforceable like any other law in courts.”² The national government acts by its own laws, through its own officers, upon its own citizens. It has direct powers of sovereignty over all the land and people of the United States, and has “full power to protect any right and to enforce any law of its own at any time, and at any place within its territorial limits, any resistance of private individuals, or state officials, acting with or without the authority of state law, to the contrary notwithstanding. Having the authority, the United States has the right to declare illegal, to fix and enforce by its own tribunals a penalty upon any resistance opposed to its agents when acting within their official spheres, and, if necessary, to prevent by its own armed forces such interference when threatened or overcome it when actually attempted.”³ Furthermore, the state courts, no less than the national tribunals, are required to recognize the constitution as the supreme law and to enforce it as such.

When actually applied, the clause quoted proved, however, not so conclusive as it seemed. Indeed, difficult questions sprang from it, leading to prolonged and serious controversies. It was clear that both national and state authorities must carry out, or at least conform to, the provisions of the constitution itself. It was no less certain that every act of Congress passed in accordance with the terms of the constitution must be enforced. Finally, it was plain that no act of a state legislature which was contrary to the national constitution was enforceable. But, in case questions were raised, who was to interpret the constitution and say what its provisions meant? Who was to decide whether a given act of Congress was or was not “made in pursuance” of the constitution—in other words, whether it was “constitutional”? Similarly, who was to

CHAP.

X

Who was to settle conflicts between the nation and the states?

¹ Art. VI, § 2.

² A. C. McLaughlin, *Confederation and Constitution*, 247.

³ W. W. Willoughby, *American Constitutional System*, 100.

determine whether the measures of the state legislatures, when called in question, were in accord with the supreme law or contrary to it and therefore void?

The constitution does not say how these things shall be done, and there has always been difference of opinion as to what the framers intended. The Virginia plan, indeed, proposed to associate a "convenient" number of the federal judges with the executive to form a council of revision. This body was to examine every act passed by Congress, and any measure to which it objected was to be allowed to take effect only if subsequently re-enacted by a two-thirds vote in both houses. The convention's final decision was, however, to put the veto power in the hands of the president alone, and the question whether the Supreme Court, or any other purely judicial body, should have the power to declare laws unconstitutional was hardly considered. From these facts, there have always been people who maintained that the fathers did not intend that the courts should have such power, and that the exercise of it is unsupported by the letter and contrary to the spirit of the constitution, and therefore sheer usurpation. The states' rights forces sought, as we have seen, to make the states the sole judge of the constitutionality both of their own legislation and of the acts of Congress.

The contrary view has, however, won more general acceptance. In the first place, the courts of the states had in several instances by 1787 refused to enforce legislative measures on the ground that they were unconstitutional.¹ In the second place, the men who framed and ratified the constitution represented those classes and interests which, in the words of Gouverneur Morris, wanted to check the "precipitancy, changeableness, and excess" of popular legislative bodies and were likely to see in the exercise of judicial review an important means to that end. Finally, judicial review is entirely in accord with the general spirit of the constitution, notably with the theory of checks and balances which, as we shall see, runs through the entire instrument.²

Here again, however, fact is more important than theory; and the fact is that the power of judicial review was early brought into play by the Supreme Court and has been systematically employed

¹ See p. 90.

² These matters are explained clearly in C. A. Beard, *The Supreme Court and the Constitution*, especially Chaps. II-V. The rise of the practice of judicial review is ably described in A. C. McLaughlin, *The Courts, the Constitution, and Parties*, Chap. I.

by both federal and state courts for more than a hundred years. An act of Congress was for the first time held void by the Supreme Court on the ground of unconstitutionality in the case of *Marbury v. Madison* decided in 1803;¹ state statutes were similarly declared void in a long line of cases beginning with *Fletcher v. Peck* in 1810.² Thus was developed a function which sharply differentiates the American judiciary from the judicial establishments of most countries. Technically, the American courts do not veto or annul laws. They do not invalidate *laws* at all; for the measures which they pronounce unconstitutional are regarded as having never been laws (even though they may have been actually in operation for months or years), and moneys that have been paid over under them are recoverable. All measures, however, are presumed to be valid law until the courts pronounce them otherwise; and no federal court will render a decision on a given measure except in connection with an actual case arising under its operation.

CHAP.
X

How is the national supremacy of which we have spoken maintained and enforced? Normally, by the ordinary routine processes of legislation and administration. But when these prove inadequate two great resources can be called into play. One is the authority of the president to execute the national laws by the use of force, whether the standing army, the militia, or some specially created military establishment. The other is the right of the federal courts to hear and decide cases in which national interests are involved. This use of the judiciary, in turn, appears in two chief forms. One is the right of the federal tribunals to hear appeals from the highest courts of the state. This right is granted to the Supreme Court in the constitution, and in the federal statutes it is so defined as to enable any case to be carried, upon writ of error, from the highest court of a state to the federal Supreme Court if during the proceedings in the state courts any state statute, or exercise of state authority, is alleged to be contrary to the national constitution, laws, or treaties. The other mode of judicial control is the removal of cases from lower state courts to federal courts, and is commonly employed when a national officer, in the exercise of his duties, performs an act which is contrary to state law and is, on that account, put on trial in a state court.³ In

How
national
supremacy
is enforced

¹ 1 Cranch, 137. To be more exact, that part of the Judiciary Act of 1789 which authorized the Supreme Court to issue a writ of mandamus under certain circumstances.

² 6 Cranch, 87.

³ *Tennessee v. Davis*, 100 U. S., 257 (1880).

these and other ways the federal courts steadily uphold the supremacy of national law and the independence of national officers; and the state courts are restrained from interfering in any manner with national judicial process.

True
ts of
onal
er

We shall come upon plenty of illustrations of how these principles and usages—particularly the practice of judicial review—have worked together to build up the tremendous power now possessed by our national government. In closing the present chapter we need only emphasize the general character of the process, which can best be done by quoting at some length the observations of a keen student of our constitutional development. "We speak of our national government," writes Professor McBain, "as one of limited powers. We say that it is limited to the powers expressly or impliedly granted by the constitution. This is, however, half truth, half fiction. True, the words of the constitution seem to confer only specific powers. But look the situation squarely in the face. Written words have no binding force except as they are given such force by human interpretations and applications. Under every written constitution some organ or organs of the government itself have the power to determine the measure of the government's own competence. The government decides for itself what the words of the constitution imply and how far it may go in the exercise of powers. The government of the United States is no exception. In most countries this power of self-determination, of self-expression, of self-aggression, resides in the national legislature. With us the power is initially in Congress and ultimately in the courts, especially in the Supreme Court. But the Supreme Court is merely an organ of the government. It is none the less so because of the high esteem in which it is commonly held or because of its general aloofness from partisan politics. Whatever is enacted by Congress and approved by the Supreme Court is valid even though to the rest of us it is in plain violation of an unmistakable fiat of the fundamental law. 'Things may be legal and yet unconstitutional,' Lord Brougham once said of English law. The paradox is equally true of American law. There is no limitation imposed upon the national government which Congress, the president, and the Supreme Court, acting in consecutive agreement, may not legally override. In this sense the government as a whole is clearly a government of unlimited powers; for by interpretation it stakes out its own boundaries."¹

¹ *The Living Constitution*, 37-38.

REFERENCES

- The Federalist*, Nos. XLI-XLVI.
- H. L. McBain, *The Living Constitution* (New York, 1927), Chap. II.
- J. Bryce, *The American Commonwealth* (4th ed., New York, 1910) I, Chaps. XXVII-XXX.
- W. W. Willoughby, *The American Constitutional System* (New York, 1904), Chaps. I-X.
- , *Constitutional Law of the United States* (New York, 1910), I, Chaps. III-IX.
- D. K. Watson, *The Constitution of the United States* (Chicago, 1910), I, Chaps. XXX-XXXIII.
- A. C. McLaughlin, *The Courts, the Constitution, and Parties* (Chicago, 1912), Chaps. I, IV.
- C. G. Haines, *The American Doctrine of Judicial Supremacy* (New York, 1914), Chaps. IV-XIV.
- F. J. Stimson, *The Law of the Federal and State Constitutions of the United States* (Boston, 1908), Chap. III.
- A. M. Schlesinger, *New Viewpoints in American History* (New York, 1923), Chap. x.
- B. F. Moore, "The Supreme Court and Unconstitutional Legislation," *Columbia Univ. Studies in Hist., Econ., and Public Law*, LIV, No. 2 (New York, 1913).
- C. A. Beard, *The Supreme Court and the Constitution* (New York, 1912).
- W. M. Meigs, *The Relation of the Judiciary to the Constitution* (New York, 1920).
- E. S. Corwin, *National Supremacy; Treaty Power vs. State Power* (New York, 1913).
- , "The Establishment of Judicial Review," *Mich. Law Rev.*, IX, 122-125, 283-316 (Dec., 1910, and Feb., 1911).
- , *The Doctrine of Judicial Review* (Princeton, 1914).
- C. Warren, "The Earliest Cases of Judicial Review of State Legislation by Federal Courts," *Yale Law Jour.*, XXXII, 15-28 (Nov., 1922).
- , *Congress, the Supreme Court, and the Constitution* (Boston, 1925).
- J. Story, *Commentaries on the Constitution of the United States* (4th ed., Boston, 1873), I, §§ 306-457, 518-545.
- R. E. Cushman, *Leading Constitutional Decisions* (New York, 1925), Chap. II.

CHAPTER XI

THE STATES

Importance

X "An American," wrote Lord Bryce a generation ago, "may, through a long life, never be reminded of the federal government, except when he votes at presidential and congressional elections, buys a package of tobacco bearing the government stamp, lodges a complaint against the post-office, and opens his trunks for a custom-house officer on the pier at New York when he returns from a tour of Europe. His direct taxes are paid to officials acting under state laws. The state, or local authority constituted by state statutes, registers his birth, appoints his guardian, pays for his schooling, gives him a share in the estate of his father deceased, licenses him when he enters a trade (if it be one needing a license), marries him, divorces him, entertains civil actions against him, declares him a bankrupt, hangs him for murder. The police that guard his house, the local boards which look after the poor, control highways, impose water rates, manage schools—all these derive their legal powers from his state alone. Looking at this immense compass of state functions, Jefferson would seem to have been not far wrong when he said that the federal government was nothing more than the American department of foreign affairs."¹

Since Jefferson's time the activities of the national government have steadily multiplied; and they are decidedly more numerous nowadays than they were even when Lord Bryce wrote. As will be explained in later chapters, the citizen now comes into contact with the authority, and with the agents, of the government at Washington much more frequently, both in time of war and in time of peace, and the government of his state can do far fewer things independently than it once could.² Nevertheless, the British observer's pregnant remarks are still broadly true. The state attracts less attention than the nation, even among its own inhabitants. But it is fully as important; indeed, in the daily life of the average man and woman it is considerably more important.

¹ *American Commonwealth* (4th ed., 1910), I, 425-426.

² For example, bankruptcy is now regulated by national, not state, law.

Almost all of one's personal and domestic concerns are conditioned upon and regulated by state action. And the national government itself is dependent upon the states in many important ways; *e.g.*, the president is chosen by electors representing the states as such and held to be state officers; the Senate represents the states and not the people generally; even the members of the House of Representatives are elected from districts laid out by state authority.¹

CHAP.
XI

The way in which the states are organized and governed will be described in a later portion of this book. For the present we are concerned only with certain major aspects—in addition to those already mentioned—of their position in the governmental system considered as a whole.

The first thing to be observed is that the states are equals in law and that, being such, they are free from control one by another.

Equality
in law

✕ In size, population, and importance they, of course, vary enormously. The largest, Texas, has an area of 265,780 square miles, which is almost exactly the combined extent of France, England, and Wales; the smallest, Rhode Island, contains only 1,250 square miles. The most populous, New York, had 10,385,227 inhabitants in 1920; the least populous, Nevada, had 77,407. Average density of population varied, at the same date, all the way from 566.4 per square mile in Rhode Island to 0.7 per square mile in Nevada. Some states are almost wholly agricultural, others are mainly industrial and commercial. Some are of great weight in the councils of the nation, others count for comparatively little. All have their separate and differing constitutions, laws, courts, systems of taxation, and schemes of local government. None the less, in their constitutional and legal status they are equal. No one of them has any powers which do not belong to all of the others. Constitutional limitations, about which more will be said presently, apply to all alike. All have the same obligations toward the national government, toward their citizens, and toward each other. Finally, no one of them can, as a commonwealth, exercise any form of coercion upon another. The only qualification which it is necessary to add is that, as will appear, Congress, when admitting a new state, can impose conditions upon it which were not imposed upon other states. But as a restriction upon state equality this is more apparent than real, because, once a state is in the Union, special

¹ The uses served by the states are summarized clearly in H. L. McBain, *The Living Constitution*, 59-65.

CHAP.
XI

Obligations
of the
national
govern-
ment
toward the
states:

1. Respect
for territorial
integrity

conditions of a political character which it has been required to meet are usually not difficult to evade if the inhabitants so desire.

The position of the states is further determined by certain obligations which the constitution imposes in their behalf upon the national government. In the first place, that government is expressly required to respect a state's territorial integrity. No state may be "formed or erected" within the jurisdiction of any existing state, except on the initiative of the state affected and with the consent of its legislature. Nor may a state be formed by uniting two or more states or parts of states unless the legislatures of the states affected concur.¹ In other words, a state cannot be deprived of its separate existence, or even of territory, without its own consent.

2. Protection
against invasion
and domestic
violence

A second obligation of the national government is to protect each state against invasion and domestic violence.² An invasion of a state by a foreign enemy is, of course, also an invasion of the United States, and it is entirely logical that the national government should be authorized and required to repel the attack without waiting for any independent effort to be made by the states as such, or for a request for protection to be received from them. The repression of insurrections, riots, and other forms of domestic violence is a different matter. One of the principal things that the government of a state is expected to do is to maintain order; and unless, finding itself unable to cope with a situation, such a government calls upon the national authorities for assistance, those authorities will not intervene, so long as the national laws are not violated and national property is not endangered. If, however, assistance is requested, the president will comply, unless he feels that the state can itself handle the situation adequately; and if national interests are menaced he will act without invitation from the state, and even against its consent.³

3. Guar-
anty of a
republican
form of
govern-
ment

A third requirement made of the United States is that it shall guarantee to every state a republican form of government.⁴ The men who framed and adopted the constitution had no desire to see monarchical institutions revived or oligarchy established within the limits of the new nation. They shuddered at the recollection of the Shays rebellion and other movements which had threatened to upset existing governments, and they determined to put it within the power—indeed to make it a solemn duty—of the na-

¹ Art. IV, § 3.

² Art. IV, § 4.

³ See p. 255.

⁴ Art. IV, § 4.

tional government to prevent any form of political organization other than republican from establishing itself anywhere in the country. They did not define the term "republican," and it is clear that they did not mean to require any one precise style of governmental organization, to the exclusion of all others. Madison specially assured the people that they had a right to "substitute other republican forms" and to claim the federal guaranty for them whenever they chose.¹ All of the existing state governments, although in many respects dissimilar, were regarded as falling within the scope of the term, and likewise, of course, the new national government under the constitution. The contemporary idea of what constitutes republicanism is sufficiently indicated by a resolution of the Massachusetts constitutional convention of 1780 which says: "It is the essence of a free republic that the people be governed by fixed laws of their own making."² Paraphrased by a recent writer, the definition becomes: "A republican form of government . . . is one in which the will of the people is the highest source of authority and looks for its interpretation and execution to responsible agents acting under the forms of law."³

The final judge of whether the government of a state is republican is not the people of the state, but the national government. The constitution does not say which branch of the national government shall decide. Conceivably, the president could declare the government of a given state to be non-republican and could use force to dispossess it; indeed in the single case in which the guaranty clause was brought into operation up to the time of the Civil War, *i.e.*, the Dorr rebellion in Rhode Island in 1841-42, the president recognized the old government of the state as the rightful government and took steps to give it the aid which it asked against a new rival government set up by an insurrectionary element.⁴ But it is Congress that has the readiest means of applying the necessary pressure; and it is Congress that would be most likely, should necessity arise, to exercise the power. If Congress should decide that a state's government is not republican, the two houses could refuse to seat the senators and representatives elected from that state. This would cut off the state from any share in making national laws and laying taxes, and would be very likely to lead to such changes in the state's system of government

CHAP.
XI

Who decides when a state government is republican?

¹ *The Federalist*, No. XLIII (Lodge's ed.), 271.

² *Journal of the Massachusetts Constitutional Convention, 1779-1780*, p. 24.

³ A. N. Holcombe, *State Government in the United States* (2nd ed.), 41.

⁴ *Luther v. Borden*, 7 Howard, 1 (1848).

CHAP.
XI

as would remove congressional objections. It was in this way that Congress overruled President Johnson's moderate plan of reconstruction and compelled the southern states to adopt governmental arrangements of the sort which the majority at Washington professed to consider requisite for republican government. As this experience shows, the duty assigned to the national government by the constitution is capable of being made the means of forcing upon a state a political system which it does not want, even though this is generally conceded to be an illegitimate use of the power conferred.

The term
to be
construed
broadly

The question of what constitutes republican government has been raised repeatedly since the Reconstruction period. Thus on one occasion it was contended that a state which denied the suffrage to women did not have republican government. The courts, however, held that since only one state¹ permitted women to vote at the time when the constitution was adopted—although all of the state governments were considered republican—equal suffrage for men and women cannot be regarded as essential to republican government.² Later, the initiative and referendum were attacked as being not republican, and therefore unconstitutional. Republican government, it was said, means representative government; the initiative and referendum are modes of direct legislation; hence they are inconsistent with the requirement that the governments of the states shall be republican. Although certain expressions of Madison, Jefferson, and other early statesmen linked up the ideas of republicanism and representation, ample historical evidence, as well as common sense, forbids the conclusion that a government must be operated in all of its parts in strict accordance with the representative principle in order to be regarded as republican in the meaning of the constitution. In deciding cases turning on the nature of republicanism, the Supreme Court has always held that the question is political in character and hence one to be decided by the political departments of the government, not by the judiciary.³

Admission
of states to
the Union

The thirteen "original" states became members of the Union by participating together in the Revolution and ratifying the Articles of Confederation and the present constitution. The other thirty-five have been brought in by a series of special acts of Congress. Considered from the point of view of the circumstances

¹ New Jersey.

² *Minor v. Happersett*, 21 Wallace, 162 (1874).

³ *Pacific States Tel. and Tel. Co. v. Oregon*, 223 U. S., 118 (1912).

under which they were admitted, these newer commonwealths fall into four classes: (1) five which were formed by separation from other states, *i.e.*, Vermont set off from New York in 1791, Kentucky from Virginia in 1792, Tennessee from North Carolina in 1796, Maine from Massachusetts in 1820, and West Virginia from Virginia in 1862; (2) one, *i.e.*, Texas,¹ which before its admission in 1845 was an independent nation; (3) one, *i.e.*, California, which was formed, also without passing through the territorial stage, out of a region ceded by Mexico in 1848; and (4) twenty-eight which have been formed out of pre-existing organized territories.²

CHAP.
XI

X The constitution confers on Congress general power to admit new states, subject only to two restrictions: (1) that no new state shall be erected within the jurisdiction of any other state, and (2) that no state shall be formed by the union of two or more states or parts of states without the consent of the legislatures of the states concerned as well as of Congress. How many states shall be admitted and what population a territory shall have before being admitted are left entirely to the discretion of Congress. Furthermore, the steps to be taken in admitting a state are not specified, although a simple and substantially uniform procedure has grown up. Ordinarily the process is set in motion by the people of a territory, who, if a sufficient number desire statehood, send a petition to Congress asking that the territory be recognized and received into the Union as a state. If the petition is regarded with favor, Congress passes an "enabling act" authorizing the territorial officials to arrange for a popularly elected convention to frame a state constitution. This constitution is forthwith prepared and submitted to the people. If it is adopted, it is sent to Congress for approval; and if it is there found acceptable, a resolution is passed declaring the said territory a state. Occasionally a territory omits the initial petition and comes at once to Congress with its proposed constitution.

Process of
admission

If, as has happened several times, Congress finds something to disapprove in the constitution that is offered, it communicates its

¹ The joint resolution admitting Texas in 1845 provided that that state might be split up into not more than five states. Notwithstanding its exceptional size, the state has never cared to be divided. It has often been proposed that Greater New York be erected into a separate state. But the "up-state" portions of the present state, constitutionally assured of a permanent majority in the legislature, are not likely to allow this to be done. Some students of American political conditions believe that the creation of certain "city states" will eventually become necessary.

² Cf. Chap. xxx. It is possible that Alaska will obtain statehood within a few years.

CHAP.
XICongressional and
presidential objec-
tions

objections to the people of the territory, suggesting or requiring that certain changes be made. And if a definite condition is imposed, there is, of course, nothing for the territory to do but comply or wait for a change of opinion in the two houses; without the consent of Congress no territory can become a state. The president, too, can take exception to a proposed constitution and can veto a resolution providing for admission. This is what happened in the case of the last of the forty-eight states to be admitted, *i.e.*, Arizona. Under the authority of an enabling act passed in 1910, the people of Arizona drew up and adopted a constitution which, in addition to other novel features, made provision for the recall of judges by popular vote. Many members of Congress believed that judges ought not to be subject to recall. Nevertheless, a joint resolution for the admission of the new state was passed. President Taft felt so strongly on the subject that he vetoed the resolution; whereupon another resolution was passed, in conformity with the president's ideas, providing for the admission of Arizona on an equal footing with the other states on condition that the recall of judges should be stricken out of the constitution. The people of the territory assented; and, having thus met the condition imposed, Arizona took her place in the Union early in 1912.

This episode, furthermore, illustrates the point that, once a state is in the Union, it can proceed to throw off any restriction of a political nature that has been laid upon it as a condition of its admission. When the people of Arizona voted to eliminate the recall of judges from the proposed constitution it was locally understood that the alteration would be only temporary. And so it fell out. In his first message the governor of the new state recommended a constitutional amendment reinstating the recall, and before the close of the year in which the state was admitted the amendment was duly adopted by both legislature and people.

Conditions
imposed on
incoming
states

From what has been said, it is evident that the power to admit or refuse to admit can be so used as to exact conditions of incoming states, or to impose limitations on them, such as were not applied to earlier members of the Union. Illustrations are numerous. The Northwest Ordinance of 1787, re-enacted by Congress in 1789, provided that new states created from the territory to which the ordinance applied should be admitted "on an equal footing with the original states in all respects whatever." Yet when Ohio was admitted, in 1802, the state was required to agree not to tax for a period of five years any lands sold within its bor-

ders by the United States; and a similar requirement was made of several states admitted later. Nevada was admitted in 1864 under pledge not to deny the right to vote to any person on account of color. Nebraska, three years later, was required to agree not to deny the suffrage or any other right on account of race or color, Indians excepted. Utah, when admitted in 1894, was required to make, "by ordinance irrevocable without the consent of the United States," provision for complete religious toleration, for non-sectarian schools, and for the abolition of polygamy. On the ground that it was in the nature of a simple agreement relating to property, a limitation binding the newly admitted state of Minnesota not to impose any tax on lands belonging to the United States, or any higher tax on non-resident proprietors than on residents, has been upheld by the Supreme Court.¹ On the other hand, the Court has emphatically declared that, after becoming a member of the Union, a state cannot be compelled to observe limitations of a political nature imposed upon it as a condition of its admission.² In summary, therefore, Congress may, notwithstanding the theory of state equality, require territories to meet any conditions that it sees fit to impose before permitting them to become members of the Union. But the obligations thus assumed can afterwards be disregarded with impunity unless they are in the nature of compacts on such a subject as property rights.³

Except in so far as they are severally restricted by agreements entered into at the time of their admission, all states have the same kinds of authority and power, however much or little they may choose to make use of their rights in any particular direction. The mode and the extent of the delimitation of state powers have been indicated in the preceding chapter. The sum and substance of the matter is that the states have all powers which the national constitution does not bestow exclusively upon the national government or otherwise deny to them. And we must now take somewhat farther notice of this subject of "constitutional limitations," or positive restrictions imposed by the national fundamental law upon state action.⁴

Constitutional limitations on the states:

¹ *Stearns v. Minnesota*, 179 U. S., 223 (1900).

² *Escanaba Co. v. Chicago*, 107 U. S., 678 (1833), and *Bollin v. Nebraska*, 176 U. S., 83 (1900).

³ W. A. Dunning, "Are the States Equal under the Constitution?" *Polit. Sci. Quar.*, III, 425-453 (Sept. 1888).

⁴ Some of these restrictions will be considered in the present chapter, and others, having to do with private rights, in the succeeding chapter.

The national constitution unequivocally forbids a state to enter into "any treaty, alliance, or confederation," and it prohibits any "agreement or compact" between states or between a state and a foreign power except with the consent of Congress. Likewise, a state may not, unless Congress assents, keep troops or ships of war in time of peace, or engage in war unless actually invaded or in such imminent danger as will not admit of delay. If Massachusetts desires to enter into an agreement with Great Britain, she can do so, with the permission of Congress, provided, of course, that the effect is not to create an "alliance or confederation," *i.e.*, a relationship of a political character. With the consent of Congress, two or more states, furthermore, may make agreements or compacts among themselves. Several such agreements are on record—for example (a) one between New York and New Jersey in 1921 concerning the port development of New York,¹ (b) one of 1922 among the seven states containing portions of the basin of the Colorado River, and having to do with the allocation of rights to the waters of that stream,² (c) one of 1925 among the states of New York, Pennsylvania, and New Jersey pertaining to the use of the waters of the Delaware River,³ and (d) a four-state pact (Washington, Oregon, Idaho, and Montana) of the same year relating similarly to the use of the waters of the Columbia. It should be noted, however, that the clause requiring consent of Congress is not to be taken with absolute literalness. Two or more states, acting quite independently, might agree to clean up a disease-producing district on their common border, and in point of fact, New York and New Jersey some years ago settled in this manner a long-standing dispute concerning sewage pollution of New York harbor. As construed by the courts, the restriction applies only to agreements "tending to increase the political power of the states, which may encroach upon or interfere with the just supremacy of the United States."⁴ Furthermore, where the consent of Congress is necessary, it may be given either before or after the agreement has been made, and may be either express or implied. Indeed, blanket permission to make agreements on a given subject may be given in advance, as was done in 1911 in connection

¹ *Nat. Mun. Rev.*, X, 449-451 (Sept., 1921).

² E. L. Hampton, "The Seven-State Irrigation Treaty," *Curr. Hist.*, XVII, 993-1002 (Mar., 1923), containing text of the agreement.

³ Ratified only by New York. A new "treaty" was signed early in 1927.

⁴ *Virginia v. Tennessee*, 148 U. S., 503 (1893).

with interstate compacts designed to conserve forests and water supply.¹

The national constitution imposes no express and absolute limitation on the taxing power of the states. But it permits certain kinds of taxes to be levied only with the consent of Congress, and it contains several clauses of a general nature which operate to keep the taxing authorities within bounds. The taxes which may not be laid without the consent of Congress are (a) imposts or duties on imports or exports, except such as may be necessary for the enforcement of state inspection laws, and (b) tonnage duties. Under the Articles of Confederation the states had the power to lay duties on imports and exports, with only the limitation that such imposts must not interfere with certain treaties entered into by the United States. The national government had no such power whatever; whence arose, largely, its financial embarrassments. Attempts to amend the Articles in this respect were fruitless. But when the new constitution was made, one of the first decisions was to give the national government sole power to lay duties on imports (although exports were not to be taxed), with only the slight qualification which has been mentioned in favor of the states. In order to take away all financial motives, and thus to reduce to a minimum the exercise of such duty-levying power as remains to the states, it is stipulated that if a state lays any duties on imports or exports, the net yield shall be turned over to the national treasury. Furthermore, Congress is authorized to revise and control all state laws on the subject.

A tonnage duty is a tax on ships levied on the basis of capacity, which is expressed in tons of one hundred cubic feet each. Vessels may be taxed independently by a state in the same way (*i.e.*, in accordance with value) that other property within the state's jurisdiction is taxed. A tax on the carrying capacity of a ship, however, is conceived of as a tax on an instrument of commerce and navigation, and can be laid only with the consent of Congress. "It makes no difference," the Supreme Court has said, "whether the ships or vessels taxed belong to the citizens of the state which levies the tax or to the citizens of another state, as the prohibition is general, withdrawing altogether from the states the power to lay any duty of tonnage under any circumstances without the consent of Congress."²

CHAP.
XI

2. Taxation

(a) duties
on imports
and exports

(b) tonnage duties

¹ *Code of the Laws of the United States* (1926), p. 426, § 552.

² *State Tonnage Tax Cases*, 12 Wallace, 204 (1871).

CHAP.

XI

(c) taxes
on federal
instrument-
talities

Another and more important limitation on the taxing power of the states arises, not from any express provision in the constitution, but from judicial interpretation of the character of the union which that instrument was meant to establish. This limitation is the principle that a state may not tax national property, tangible or intangible, or any lawful national agency or instrumentality. This rule was propounded most clearly and authoritatively in the famous decision prepared by Chief Justice Marshall in the case of *McCulloch v. Maryland* in 1819. In 1818 the state of Maryland imposed a stamp tax on the circulating notes of all banks or branches thereof located in the state and not chartered by the legislature. The Baltimore branch of the United States Bank refused to pay this tax. Suit was brought against the cashier, McCulloch, and the state court rendered judgment against him; whereupon the case was taken to the federal Supreme Court. Pronouncing the law imposing the tax unconstitutional, Marshall declared that, unlimited as is the power of a state to tax objects within its jurisdiction, that power does not "extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States . . . powers . . . given . . . to a government whose laws . . . are declared to be supreme."¹

Maryland's attorneys argued that since the taxing power is concurrent in the national and state governments, the states can tax a national bank as freely as the nation can tax state banks. Marshall, however, declared this fallacious. "When they [the people of all the states, and the states themselves, as represented in Congress] tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. . . . The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme and those of a government which, when in opposition to those laws, is not supreme. . . . If the states may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the custom

¹4 Wheaton, 429-430 (1819).

house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. . . . The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."¹

CHAP.
XI

The states are, accordingly, debarred from taxing national bonds, national franchises, the salaries of national officers, and national property, such as lands, buildings, fortifications, and lighthouses. Under provisions of an act of Congress passed in 1864 they may, however, tax national bank stock, and likewise the physical property belonging to national banks. Such taxes, falling on property rather than on operations, are considered not to detract from the capacity of the banks to serve the government according to the intent of the laws establishing them, and on this account the legislation of 1864 has been construed to be, not a grant by the United States of a power not previously possessed (Congress has no authority to make such a grant), but rather the removal by Congress of a hindrance to the exercise by the states of a power inherent in them.²

Finally, it may be pointed out that state powers of taxation are in practice restricted by (1) the inability of a state to give force to its laws outside of its own boundaries, from which it results that only such property can be taxed as is within the jurisdiction of the state;³ and (2) the constitutional provision (a) that no state shall "deprive any person of . . . property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws," (b) that no state shall pass any law "impairing the obligation of contracts," and (c) that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The taxing power cannot be so used as to violate any of these general restraining clauses.

(d) other
restraints

We have seen that one of the main objects of those who urged the revision of the Articles of Confederation was to remedy the

3. Com-
merce

¹ 4 Wheaton, 435-436 (1819).

² *Van Allen v. Assessors*, 3 Wallace, 573 (1865). It should be observed that in the case of *McCulloch v. Maryland* the Supreme Court denied the right of Maryland to tax the circulation of the Baltimore branch of the United States Bank, but did not question the state's right to tax the branch's real property.

³ The difficulty of determining precisely what property is within the jurisdiction of a state is described in W. W. Willoughby, *Constitutional Law of the United States*, II, 943-969.

chaotic condition of commerce arising from the conflicting commercial policies of the several states and from the total lack of power of the national government to deal with the subject. The states could not have been expected to yield control of trade exclusively within their own borders to any outside authority, and no one asked that they should do so. But the need that was chiefly felt was met in the simple statement in the new constitution that Congress should have power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes."¹ The nature and methods of the national control over foreign and interstate commerce which has been built up on the basis of this slender, but sufficient, clause will be considered at length in a later chapter,² and it must suffice here merely to note (a) that, with the marvelous expansion of commerce among the states in the past hundred years, and the ever-broadening conception of what commerce includes, a volume of national regulatory authority has been developed wholly beyond anything the constitution's framers had in mind, and (b) that although the states retain complete control of intrastate commerce, such commerce is construed, very strictly, to mean only commerce which originates, ends, and has its entire course in a single state. If commerce passes for but an instant beyond the state's borders, the state loses control and the laws of Congress apply. Furthermore, commerce which at any stage takes on an interstate character is dealt with as such from the moment that the transaction starts until it is completed.

One of the main advantages of union is a common currency system. Hence the federal constitution gives the national government full control of the currency and forbids the states to coin money, to emit bills of credit, or to "make anything but gold and silver coin a tender in payment of debts." Under their reserved powers, the states can charter banks; and banking institutions so created exist beside, and compete with, national banks in all of the states. Furthermore, the states can authorize these banks and banking associations to issue notes for circulation. An act of Congress passed in 1866, however, rendered this power of little practical value, because the ten per cent tax laid on the notes makes it unprofitable to issue them. The constitutionality of this law was challenged, but the Supreme Court upheld it on the ground that

¹ Art. I, § 8, cl. 3.² Chap. XXVIII.

the tax was a means of regulating the currency, which is a function clearly belonging to the national government. "Congress," the court said, "may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile. . . . We cannot doubt the constitutionality of the tax under consideration."¹ As a result, state bank currency has gone wholly out of use.

CHAP.
XI

Society exists and business is carried on by virtue of a network of human relations which find expression in agreements, or contracts; and little thought is required to show how insecure and impossible our everyday existence would be if these agreements could be disregarded with impunity. It is not strange, therefore, that the framers of the national constitution put into that instrument a clause explicitly forbidding the states to pass any law impairing the obligation of contracts. They did not lay a similar prohibition on the national government; but this was mainly because it was expected that the business relationships of men would be controlled by the state governments rather than by Congress.

5. Con-
tracts

A contract may be defined as an agreement enforceable at law; and no state legislation which weakens the obligations arising from such an agreement after it has been entered into by two or more parties is valid unless considerations of public health, safety, or morals demand it or compensation is rendered for the injury done. Both the definition and the rule are, however, easier to state than to apply. Ordinary agreements, executed in due legal form, between individuals or groups of individuals are obviously included. But how about a charter granted by a state to a bank or a railroad company? Or an appointment to a public office? Or a license to practice medicine? These and many similar questions have been the subject of great numbers of judicial decisions, whose general results can only be summarized here. In the *Dartmouth College* case, in 1819, the Supreme Court held that the charter of the college was a contract which the state legislature had no power either to revoke or to impair without the college's consent.² This meant that franchises and charters obtained by private corporations from state legislatures were within the scope of the constitutional guaranty; and corporations long tried to maintain that any withdrawal or curtailment of the privileges that had been granted them

Charters,
franchises,
etc., not
included¹ *Veazie Bank v. Fenno*, 8 Wallace, 533 (1869).² *Dartmouth College v. Woodward*, 4 Wheaton, 518 (1819).

was an illegal impairment of contract. If this contention could have been established, the results would have been serious. But the courts took the common-sense view that charters and franchises are, after all, only a species of property, and as such can be taken away with compensation—or even without compensation when it can be shown that paramount interests of public welfare demand it. Furthermore, it is open to legislatures, when granting new charters, to insert in them clauses making them revocable or alterable at will; and this is now usually done. Having taken this precaution, a state can act at any time with impunity, subject only to the limitations contained in the Fourteenth Amendment.

By judicial determination, the charters of public corporations, *e.g.*, cities and counties, investing them with subordinate legislative and other governmental powers are not contracts within the meaning of the "obligation" clause. So far as the national constitution is concerned, the state legislature can repeal them or amend them in any way at any time. Various forms of agreement between a state and its citizens are also construed not to be contracts. Thus a person who is appointed to a public office, even for a fixed term and at a definite salary, acquires no vested right; no contract is violated if the state abolishes the office altogether. Furthermore, a license issued by a state, or by one of its political subdivisions, is not a contract, but only a grant of privilege which can be legally revoked at any time.

Obligations
of the
states in
their rela-
tions with
one
another:

Except in so far as the national constitution has provided otherwise, the states are separate, and each is supreme within its own sphere of authority. Massachusetts cannot give force to her laws in Connecticut; an Ohio judge cannot hold court in Indiana. Every state, however, must have dealings from time to time with all of the other states, and the populations of all of the forty-eight are constantly commingling in pursuit of the various professions. It becomes, therefore, a practical necessity that the states accept in common certain obligations toward one another. Four specific obligations were, indeed, imposed by the national constitution as originally adopted. One of them—the duty to deliver up fugitive slaves escaping from one state into another—became obsolete upon the adoption of the Thirteenth Amendment in 1865. The other three continue in effect and pertain to (1) recognition of legal processes and acts, (2) interstate citizenship, and (3) rendition of persons accused of crime.

"Full faith and credit," says the constitution, "shall be given

in each state to the public acts, records, and judicial proceedings of every other state.”¹ This means that the authorities of Illinois must recognize and accept a decision of a court in Michigan, on presentation of an authenticated copy of the record, precisely as they would honor the decision of a court in their own state. If it should fall to an Illinois court to enforce the decision, it would do so without a re-trial of the issue. To make the illustration more concrete: A. and B. are residents of Detroit. A. brings suit against B. and gets a judgment in the amount of five hundred dollars. Without paying, B. moves to Chicago, taking his property before it can be attached. Under the “full faith and credit” clause, A. can go into a court in Illinois, and with simply the judgment of the Michigan court as evidence, obtain a decree against B. for the amount of the judgment. B. may challenge the authenticity of the record; and he may demand a re-trial on the ground that the Michigan court did not have jurisdiction. But on no other ground can he secure a reopening of the case.

CHAP.
XI
1. Recognition of
legal
processes and acts

Not only judicial findings and decrees, but marriages, wills, deeds, contracts, and other civil actions, come within the scope of the clause under consideration. Two states may have widely differing laws relating to wills; yet each will accept and enforce, when occasion arises, a will made under the laws of the other. It should be noted, however, that the “full faith and credit” clause applies only to civil judgments and decrees; the Supreme Court holds that no state is compelled by this provision to lend its aid in the enforcement of the penal laws of another state.²

The framers of the national constitution were wisely of the opinion that the states ought not to be allowed to abuse their powers by discriminating, in favor of their own citizens, against persons coming within their jurisdiction from other states. Such conduct would be inherently unjust and would seriously impede the growth of national unity. Hence it is provided that “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”³ This means that citizens may move freely about the country and settle where they will, with the assurance that they will not be subjected to special discriminatory taxation, that they will be permitted to carry on lawful occupa-

2. Inter-
state citi-
zenship

¹ Art. IV, § 1.

² *Wisconsin v. Pelican Insurance Company*, 127 U. S., 265 (1888).

³ Art. IV, § 2, cl. 1. R. Howell, “The Privileges and Immunities of State Citizenship,” *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XXXVI (1918).

tions under the same conditions as native citizens, that they will not be prevented from acquiring and using property, or denied the equal protection of the laws, or refused access to the courts. It does not mean that privileges of a political nature must be extended at once. "A state," said the Supreme Court in a decision handed down in 1898, "may, by rule uniform in its operation as to citizens of the several states, require residence within its limits for a given time before a citizen of another state who becomes a resident thereof shall exercise the right of suffrage or become eligible to office."¹ Moreover, the clause does not prevent a state from making quarantine or other police regulations which will have the effect of denying free ingress or egress or the right to bring property in or to take it out. But such police restrictions must be justified by provable public necessity; furthermore, they must be so framed as to fall alike upon the citizens of the given state and those of all other states. It is hardly necessary to add that a citizen of New York, migrating to Pennsylvania, does not carry with him the rights which he enjoyed in New York. The point is rather that he becomes entitled to such rights as the citizens of Pennsylvania enjoy.

3. Rendition

A third obligation resting on the state is the rendition of fugitives accused of crime. "A person charged in any state with treason, felony, or other crime," says the constitution, "who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."² Rendition—which is equivalent to extradition in the international field—passed into American constitutional law from international practice;³ treaties on the subject were not unknown in antiquity, and in the past hundred years they have become numerous. Nations are inclined to stand strictly on their sovereign rights, and international extradition is practiced under certain very definite limitations. In the first place, nations will rarely or never hand over a fugitive unless they have a reciprocal extradition agreement with the nation demanding him. In the second place, they will not surrender him unless the crime of which he is accused is one of those enumerated for extradition purposes in the treaty. Furthermore, nations usually refuse to extradite

¹ *Blake v. McClung*, 172 U. S., 239 (1898).

² Art. IV, § 2, cl. 2.

³ The principle was first embodied, in this country, in the agreement which formed the basis of the New England Confederation of 1643.

their own citizens or subjects, and by universal usage political offenders are exempted. Finally, it has become an accepted rule that an extradited person cannot be tried for any offense other than that named in the warrant of extradition.

CHAP.
XI

Rendition as practiced by the states means about the same thing, but it is carried out under different conditions. It is provided for by the national constitution, not by interstate agreements; the offenses for which an accused person is to be delivered up are broadly defined as treason, felony, and "other crimes;" states commonly give up their own citizens on proper demand; and there is no rule against trying a person so delivered up for an offense other than that with which he was charged when his delivery was requested. The constitution says that the demand for the surrender of a fugitive from justice shall be made by the executive authority of the state from which the person fled, and an act of Congress provides that it shall be addressed to the executive authority of the state in which the accused has been apprehended. If, therefore, A. kills a man in Ohio and flees into West Virginia and is there placed under arrest, the governor of Ohio will send a requisition, accompanied with a certified copy of the indictment, to the governor of West Virginia asking the return of A. so that he may be placed on trial in an Ohio court. If the requisition is honored, the fugitive will be turned over to the Ohio police officer who has been dispatched to bring him back.

The
process

But there is no positive assurance that the demand will be complied with. The constitution plainly says that the fugitive "shall . . . be delivered up," and the act of Congress says, with equal directness, that it "shall be the duty of the executive authority" to cause him to be handed over. Nevertheless, the governor upon whom the demand is made actually exercises his discretion, and many cases of refusal are on record. He may refuse on the ground that the accused will not get a fair trial if returned, or on the ground that the alleged offense is not known to the law of the refuge state; the real reason may be only a personal grudge. But in any case there is no way in which an adverse decision can be overborne. In a case which turned on this question, the opinion of the Supreme Court, rendered by Chief Justice Taney, was that "the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this command created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the

Limita-
tions

execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the constitution which arms the government of the United States with this power." In the final analysis, the obligation of rendition, while clearly imposed upon the states by the constitution, is effective only in so far as the chief executives are willing to make it so. But this does not mean that it is obsolete, or even that it is generally ignored; on the contrary, it is observed in the great majority of cases, and when not observed is usually evaded for reasons which have substantial merit.¹

The history of the Confederation was filled with controversies between states regarding boundaries, commercial regulations, and other matters, and the makers of the constitution were not so optimistic as to suppose that under the new frame of government the members of the Union would always live in perfect accord. Consequently they provided that the judicial power of the United States should extend to all "controversies between two or more states," and that in all cases in which a state should be a party (regardless of the character of the opposing party) the Supreme Court should have original jurisdiction.² As has been pointed out, interstate disputes are sometimes settled by quasi-diplomatic agreements, with or without the concurrence of Congress.³ But the road to amicable adjustment by regular judicial process is always open; and many troublesome differences have been overcome in this way.⁴

REFERENCES

- J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chaps. xxviii, xxxvi.
 W. F. Dodd, *State Government* (New York, 1922), Chap. II.
 A. N. Holcombe, *State Government in the United States* (2nd ed., New York, 1926), Chaps. I-V.
 J. M. Mathews, *American State Government* (New York, 1924), Chap. I.
 E. McClain, *Constitutional Law in the United States* (New York, 1905), Chaps. xxxi, xxxiii.
 C. K. Burdick, *The Law of the American Constitution* (New York, 1922), Chaps. xix-xxxiv.

¹ *Kentucky v. Dennison*, 24 Howard, 66 (1861).

² Art. III, § 2.

³ See p. 144 above.

⁴ The complete record to 1918 will be found in J. B. Scott (ed.), *Judicial Settlement of Controversies between States of the American Union*, 2 vols. (New York, 1918). During the next five years after this work was published no fewer than twenty-eight suits between states, or phases of such, were filed with or passed upon by the Supreme Court. See *Amer. Jour. of Internat. Law*, XVII, 326-328 (Apr., 1923).

- W. W. Willoughby, *The American Constitutional System* (New York, 1904),
Chaps. II, VI-VIII, XVIII-XIX. CHAP.
XI
- , *Constitutional Law of the United States* (New York, 1910), I,
Chaps. X-XV, XXI, XLIX.
- D. K. Watson, *The Constitution of the United States* (Chicago, 1910), I,
Chaps. XLVII-XLVIII.
- J. Story, *Commentaries on the Constitution of the United States* (4th ed.,
Boston, 1873), I, §§ 1353-1410.
- W. Wilson, *Constitutional Government in the United States* (New York, 1908),
Chap. VII.
- F. J. Stimson, *The American Constitution* (New York, 1908), Chap. VI.
- C. Warren, *The Supreme Court and Sovereign States* (Princeton, 1924).
- A. N. Holcombe, "The States as Agents of the Nation," *Southwestern Polit.*
Sci. Quar., I, 307-327 (Mar., 1921).
- R. Hayden, "The States' Rights Doctrine and the Treaty-Making Power,"
Amer. Hist. Rev., XXII, 566-585 (Apr., 1917).
- J. B. Moore, *A Treatise on Extradition and Interstate Rendition* (Boston,
1891).
- J. A. Scott, *Law of Interstate Rendition* (Chicago, 1917).
- T. R. Powell, *Indirect Encroachment on Federal Authority by the Taxing
Powers of the States* (New York, 1918).
- R. L. Olson, *The Colorado River Compact* (Los Angeles, 1926).
- F. Frankfurter, "The Compact Clause of the Constitution—a Study in
Interstate Adjustments," *Yale Law Jour.*, XXXIV, 685-758 (May, 1925).
- A. A. Bruce, "Compacts and Agreements of States with One Another and with
Foreign Powers," *Minn. Law Rev.*, 500-516 (June, 1918).
- W. C. Williams, "The Colorado River and the Constitution," *Amer. Bar
Assoc. Jour.*, XII, 839-841 (Dec., 1926).
- J. B. Scott, *The United States of America; A Study in International Organi-
zation* (New York, 1920).
- The Constitution of the United States of America as Amended to December
1, 1924* (68th Cong., 1st Sess., Sen. Doc. No. 154), 493-535. Elaborate
annotation of Art. IV on states' relations.

CHAPTER XII

CITIZENSHIP AND PRIVATE RIGHTS

The status
of aliens

x The inhabitants of the United States fall into two categories or classes according as they happen to be citizens or aliens. So long as no question of protection abroad is involved, there is, however, no great difference between the relation of the citizen and that of the alien to the governments of state and nation. Under international law and the public law of all civilized states, the legal jurisdiction of a state (using the term in the general sense) extends over all persons who are for the time being within territory under its actual control. Therefore the unnaturalized German or Italian domiciled in New York must obey the laws both of the United States and of New York; he must pay the taxes which are paid by citizens; and while, by international custom, he may not be required to serve in the army or to render certain other services which can appropriately be required only of citizens, he may be called upon to do militia or police duty in defense of the local laws which protect his life and property. These obligations are compensated by rights which international custom has also created. An alien is no less entitled to protection in life and property than a citizen; when injured, he has the same avenues of redress that are open to citizens; he may be denied the opportunity to acquire land, and the ballot is usually withheld from him, but he cannot be discriminated against in any way which international practice stamps as unreasonable; and by complying with certain legal requirements he may usually himself become a citizen.

Who are
citizens?

What does it mean to be a citizen? And, first of all, who *are* citizens? Curiously enough, this was long a matter of doubt. The constitution, as originally adopted, used the term not fewer than seven times, but nowhere defined it. It mentioned both citizens of states and citizens of the United States,¹ thereby con-

¹ "Citizens in each state shall be entitled to all the privileges and immunities of citizens in the several states" (Art. IV, § 2); "No person except a natural-born citizen or a citizen of the United States at the time of the adoption of this constitution shall be eligible to the office of president" (Art. II, § 1, cl. 4).

veying the impression that there were two citizenships rather than one, yet without explaining which was anterior to the other, or which was the more fundamental. For some decades this lack of definiteness caused no great amount of trouble. It was commonly considered that the two citizenships were reciprocal; that is, by virtue of residence in a state a federal citizen was *ipso facto* a citizen of that state, while a state citizen was *ipso facto* a federal citizen.

CHAP.
XII

The states' rights school, however, gradually developed the view that the two citizenships were separable, that state citizenship was the more fundamental, and that national citizenship was but a consequence of citizenship in some state, although not every citizen of a state became *ipso facto* a citizen of the United States. This doctrine was upheld by the Supreme Court in the Dred Scott case in 1857, in which the question was whether a state could make a negro one of its citizens and, if so, whether a person thus favored thereby necessarily became a citizen of the United States, entitled to bring a suit in a federal court. The majority decision was that, although a state might confer on a negro all of the rights and privileges of its own citizenship, this did not make him a citizen of the United States. Indeed, the court went so far as to say, in effect, that negroes, though living in the United States and subject to its jurisdiction, were not, and could not be made, by either state or federal action, citizens of the United States within the meaning of the constitution.¹

The states'
rights view

The bitter controversies over the status of the freedmen at the close of the Civil War led Congress first to give the term "citizen" a statutory definition, and later to take steps to incorporate the definition in the constitution itself. The Civil Rights Act of 1866 recognized as citizens "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed;" and the Fourteenth Amendment, adopted in 1868, provides, more comprehensively, that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." This definition, it will be noted, retains the idea of two citizenships, and the Supreme Court has held that the two remain as distinct as before.² To be a citizen of the United States, it is necessary only to have been born or naturalized in the country and to be subject to

Definition
in the
Four-
teenth
Amend-
ment

¹Scott v. Sanford, 19 Howard, 393 (1857).

²Slaughter House Cases, 16 Wallace, 36 (1873).

X its jurisdiction; there is no requirement of residence. To be a citizen of a state, it is necessary to be a resident of that state; it is not necessary to be a citizen of the United States. All United States citizens residing in a state are, by constitutional provision, citizens of that state, but the state may confer its own citizenship on other persons than United States citizens, and in a number of cases this has been done. Federal and state citizenship, therefore, are not identical. There are United States citizens, *e.g.*, citizens resident abroad, who are not state citizens; conversely there are state citizens upon whom national citizenship has not been conferred.

Declining
importance
of state
citizenship

X National citizenship, however, is now primary, state citizenship secondary. The state has only very limited power to determine who shall be, or become, its citizens; it must accept as its own citizens any national citizen who chooses to take up his residence within its boundaries, and the Fourteenth Amendment forbids it to "make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." Furthermore, in dealings with foreign powers it is only United States citizenship that counts. When the citizen goes abroad he carries the same form of passport and is entitled to the same protection, whether he lives in New York, Ohio, or California. Since 1868, therefore, the distinction between state citizenship and national citizenship has been of steadily decreasing importance. For all practical purposes, it would be accurate, as it would be decidedly less confusing, to speak of citizens of the United States, but only of residents or inhabitants of the states.¹

Citizenship
by birth:

A study of the subject on comparative lines discloses many different modes of acquiring citizenship. Thus in Norway aliens appointed to positions in the civil service automatically become citizens; in various Latin American states the purchase of real estate has a similar effect; marriage, adoption, and even prolonged residence, lead in certain countries to the same end. Far the greater portion of citizens in all lands become such, however, either by birth or by a formal process known as naturalization. Historically, the acquisition of citizenship by birth has been determined according to two different principles, both of which find recognition in the present practice of the United States. One of these principles is the *jus sanguinis*, under which the nationality of the child is construed to be the same as that of the parents or

1. *Jus
sanguinis*

¹C. A. Beard, *American Government and Politics* (4th ed.), 121.

one of them, regardless of the place of birth. The other is the *jus soli*, according to which nationality is determined by the place of birth, irrespective of the citizenship of the parents. The *jus sanguinis*, which was commonly followed in antiquity, passed into the Roman law and also the law of the early Germans. Under the influence of feudal ideas, which stressed the relation of the individual to land, the *jus soli* for a time supplanted the rule of blood relationship. But the revival of Roman law in the later Middle Ages brought the latter again into general favor; and *jus sanguinis* is today the principle according to which citizenship is determined in practically all of continental Europe, and also throughout Latin America.

On the other hand, the *jus soli*, first introduced in England at the time of the Norman Conquest, has continued to prevail there; and from England it was brought, as a part of the common law, to English-speaking America. The Supreme Court early declared that citizenship by birth was to be determined according to this principle;¹ and by stipulating that all persons born in the United States and subject to the jurisdiction thereof should be considered citizens, the Fourteenth Amendment re-enacted the common-law rule and incorporated it in the constitution. The rule has been held to be no less applicable to children born of alien parents who are ineligible for naturalization than to the offspring of parents who are eligible. Thus in the case of *United States v. Wong Kim Ark*,² decided in 1898, the Supreme Court declared that a child born of Chinese parents in the United States is a citizen, notwithstanding that Chinese, under United States laws, are incapable of being naturalized.

The doctrine of *jus soli* is, however, not followed completely or exclusively. In the first place, the phrase "and subject to the jurisdiction thereof" sets up a qualification. Thus, children born to foreign diplomatic representatives in the United States are not citizens, because even though born on American soil they are considered to be subject to the jurisdiction of the state which the minister or ambassador represents, and not to the jurisdiction of the United States. Children born, however, in the United States to consuls or to other foreign citizens or subjects residing or temporarily sojourning here are held to be natural-born citizens, for

CHAP.
XII

2. *Jus
soli*

Both principles followed to some extent in the United States

¹ Alexander Murray *v. Schooner Charming Betsy*, 2 Cranch, 64 (1804).

² 169 U. S., 649. W. W. Willoughby, *Constitutional Law of the United States*, I, 274-279.

the reason that, being covered by no diplomatic immunity, they are subject to American jurisdiction. In the second place, the rule of *jus sanguinis*, rather than that of *jus soli*, is applied in the case of children born abroad to any and all persons who are themselves American citizens. An act of Congress passed in 1855 provides that any child whose father was an American citizen when the child was born shall itself be deemed a citizen, even though born outside of the country's jurisdiction, provided the father has at any time resided in the United States.¹ The force of this act was somewhat tempered by a statute of 1907 which provides that a person born abroad of American parents shall be entitled to protection from the United States only in case he shall, at the age of eighteen, have recorded at an American consulate his intention to become a resident and to remain a citizen of the United States, and shall, at the age of twenty-one, have taken an oath of allegiance to the United States. Furthermore, the United States will not protect its *jure sanguinis* citizens against the claims of the state in whose territory they were born if that state claims them as its citizens or subjects *jure soli*; and, conversely, children born of aliens in the United States are not protected against the state to which their fathers belong if it claims them as its citizens *jure sanguinis*.

Another exception, formerly, to the application of *jus soli* was furnished by Indians living in tribal relations; although born within the jurisdiction of the United States, such Indians could become citizens only by naturalization, as in the case of other "aliens." An act of Congress approved on June 2, 1924, however, authorized the Secretary of the Interior to issue certificates of citizenship to all such Indians. The number receiving the new status was computed at about 135,000, out of a total Indian population of 250,000. All Indians born within the jurisdiction of the United States—apparently even Alaskan Eskimos—are now citizens.

Naturaliza-
tion of
inhabi-
tants
of annexed
territories

The second principal mode by which citizenship is gained is naturalization, which means the conversion of aliens into citizens by some special governmental act. Naturalization may be either collective or individual. The most usual form of collective naturalization is the extension of citizenship to the inhabitants *en bloc* of territories annexed by treaty or conquest. Down to 1898, the United States regularly conferred citizenship upon the whole body

¹ U. S. Revised Statutes, § 1903.

of inhabitants of the territories which it annexed.¹ In the case of Louisiana, Florida, and Alaska, the treaties of cession provided that the inhabitants should be admitted "as soon as possible to the enjoyment of all the rights, advantages, and immunities of citizens of the United States;" in the case of Texas, all citizens of the formerly independent state were made citizens of the United States by resolution of Congress; American citizenship was conferred on the citizens of the former Hawaiian republic by an act of 1900 which established civil government in the new dependency; and in 1927 an act was approved making citizens of the inhabitants of the Virgin Islands. On the other hand, the treaty of peace with Spain in 1898 by which the United States acquired Porto Rico, Guam, and the Philippines expressly provided that the cession of these islands should not operate as a naturalization of their native inhabitants, and it delegated the determination of the civil status and political rights of these insular populations to Congress. In later statutes Congress declared the Porto Ricans and Filipinos to be citizens of their respective islands, and conferred upon the former most, and upon the latter some, of the privileges and immunities of citizens of the United States. Furthermore, the Supreme Court held that Porto Ricans were not aliens in the sense in which the term is used in the immigration laws.² So that, although full American citizenship was not conferred upon them, both Porto Ricans and Filipinos became, in international law, "nationals," no less entitled to the protection of the United States than are full-fledged citizens; and in constitutional law the distinction—at least in the case of the Porto Ricans—was substantially one without a difference. Finally, in 1917, the Porto Ricans were made "citizens of the United States."

✧ Naturalization is, however, usually individual, rather than collective, and as practiced in all countries it involves the granting of citizenship by a court or an administrative officer after the applicant has fulfilled certain prescribed conditions. The national constitution authorizes Congress to "establish an uniform rule of naturalization;" and although it was at first supposed in some quarters that naturalization was one of the concurrent powers to be exercised by the states as well as by the nation, this opinion was soon recognized to be groundless, and in 1817 Chief Justice Marshall was able to declare that it was not, and "certainly ought

CHAP.
XII

Naturaliza-
tion of
individual
aliens

¹ Except uncivilized native tribes in Alaska.

² *Gonzales v. Williams*, 192 U. S., 1 (1904).

not to be," doubted that the power is vested exclusively in Congress.¹

The first federal statute on the subject, passed in 1790, was very brief, and for a hundred years much was left to chance, or, at least, to the discretion of the naturalization authorities. As a result, the work was performed in no uniform manner and grave abuses arose. In most states it was necessary to be a citizen in order to be a voter. ✕ Party organizations and candidates were, therefore, under strong temptation to procure the naturalization of all alien residents whose votes they could hope to control. One way of evading the law was to equip the alien with forged or otherwise fraudulent naturalization papers, and thus to get his name on the voting list. But the commonest device was to rush candidates through the naturalization process in great numbers on the eve of registration, when there was not time, even if there was the disposition, to inquire closely into the merits of individual applications. It was, of course, in the cities, where aliens were most numerous and where the naturalization authorities were close at hand, that this practice was most common; and, as a recent writer has said, the naturalization of foreigners "became one of the regular undertakings of the ward organization: the applicant's petition was made out for him, his witnesses were supplied, the foreigner being nothing more than a participant in formalities which he did not even understand. The handling of fifty or sixty naturalizations per hour was not a rare achievement in New York courts. . . . Under such pressure during the days preceding the registration of voters, all careful scrutiny of petitions was out of the question; and the voters' lists of the larger cities were regularly padded with the names of persons who had not fulfilled the stated qualifications at all."²

Following an extensive investigation of the subject by a commission appointed by President Roosevelt, Congress in 1906 passed a law which regulates the conditions and processes of naturalization in considerable detail,³ and while prevailing practices still leave much to be desired, the grosser frauds of earlier days have been pretty much eliminated. Under the general supervision of the bureau of naturalization, in the Department of Labor, the work of naturalization is performed by courts of designated grades, *i.e.*,

¹ *Chirac v. Chirac*, 2 Wheaton, 259 (1817).

² W. B. Munro, *Government of the United States* (rev. ed.), 96.

³ *U. S. Compiled Statutes* (1918), pp. 653-661.

all federal circuit courts of appeals and district courts, the Supreme Court of the District of Columbia, and all state and territorial courts of record which have a clerk and a seal and have jurisdiction in actions at law or equity in which the amount in controversy is unlimited. Canada is the only other country in which the judiciary is employed for this purpose; elsewhere the work is done, as a rule, by administrative officers. The investigating commission of 1905 pronounced the courts unsatisfactory as naturalization authorities, but added that no machinery was available which promised better results. It did, however, urge that the function should be confined to courts of greater dignity and importance than many of those then exercising it; and in line with this recommendation the proposal has repeatedly been offered that the power to naturalize be restricted to federal tribunals, which undoubtedly, taken as a group, have exercised it with more care than have the state and territorial courts. The federal courts, however, have not been above reproach; and it is farther objected that the change would give an undue advantage to aliens in the larger cities, where the federal courts are chiefly to be found.¹

The process of naturalization involves three main steps. The first is a declaration of intention to become a citizen, which must be filed with a duly authorized federal or state court at least two years before the applicant is given his final examination. The second is the filing of a petition, not less than two years nor more than seven years subsequently, stating that the applicant has been a resident of the United States for at least five years, and that he is not an anarchist or a polygamist. This petition can be presented only to a competent court within whose jurisdiction the applicant has lived for at least one year immediately preceding. Full information must be given about both the candidate and his family (if he is married), and the application must be supported by affidavits of two citizens testifying to the applicant's period of residence and his moral character. The third step, taken not less than ninety days after the petition is filed, is the hearing and examination by the judge. During the interval the petitioner's claims may be investigated by a federal agent, and at the hearing the petitioner must himself be present to answer questions, although since 1926 it is not essential that the two sponsors be in

Mode of
naturalization

¹ The commission of 1905 discovered that a total of 5,003 state courts and 157 federal courts were naturalizing aliens. As a result of regulations imposed in the act of 1906 and later statutes, the numbers are now about 2,000 and 200 respectively.

attendance if the inspector's report upon the candidate has been favorable. The examination given by the judge will be as thorough, or as perfunctory, as he cares to make it. As a rule, it does not go beyond ascertaining that all the requirements of the law have been complied with, that the candidate is not an opponent of organized government, and that he knows a few fundamental facts about the American political system. Having satisfied himself on these scores, the judge authorizes the clerk of the court to issue letters of citizenship, or "final papers."¹

Short-
comings
of the
system

As was suggested above, the system is by no means perfect. The applicant must swear that he "speaks English;" but ability to utter "yes" and "no" often suffices, and indeed a judge is reported to have been satisfied with a candidate who merely "nodded his head in English!" The law presumes intelligence, but provides no standards by which that saving grace is to be judged. It presupposes some knowledge of the form of government of the United States, but leaves the way open for the widest latitude in the tests imposed. In congested areas applicants are still admitted in blocks of fifty, to the accompaniment of plenty of sharp practices, especially when an election is at hand.² A remedy that naturally suggests itself is the procuring of more complete information about applicants before they make their appearance in court. Judges and other court officials cannot do this; they are occupied with other things. But representatives of the federal bureau of naturalization can be employed for the purpose, and it is gratifying to record that under a statute passed in 1926 much more use of such agents is being made today than ever before. Naturalization remains a function of the courts, but administrative authorities bear an increasing share in the work.³

Aliens
who are
ineligible

Not all aliens, it must be observed, are eligible for naturalization, but only such as are "white persons or of African nativity or of African descent." This qualification bars out most Asiatics. The Chinese are expressly excluded; the Japanese are excluded by interpretation as not being white persons or of African extraction.⁴ As we have seen, however, children born of Asiatic parents who are

¹ H. P. Williams, "The Road to Citizenship," *Polit. Sci. Quar.*, XXVII, 399-427 (Sept., 1912).

² I. B. Oakley, "Scandalous Methods of Making American Citizens," *Curr. Hist.*, XXIV, 205-210 (May, 1926).

³ H. B. Hazard, "The Trend Toward Administrative Naturalization," *Amer. Polit. Sci. Rev.*, XXI, 342-349 (May, 1927).

⁴ *Ozawa v. U. S.*, 260 U. S., 178 (1922); *Toyota v. U. S.*, 268 U. S., 402 (1924).

resident in the United States and subject to its jurisdiction are citizens by birth. Hindus have been held ineligible.¹ On the other hand, a federal district judge in Oregon has ruled that Armenians are eligible, and both the Department of Justice and the Bureau of Immigration have accepted the ruling as correct.² The eligibility of certain other classes of Asiatics is still in doubt.³

CHAP.
XII

X Save in two respects, a naturalized citizen stands on the same footing as a citizen by birth: he is ineligible to the offices of president and vice-president, and in the event that the nation of his former allegiance has any claim on him, *e.g.*, for military service, he will not be protected against such claim if he re-enters that nation's jurisdiction.⁴ The legal status of a person during the interval between filing his declaration of intention and presenting his final petition was long a matter of doubt. Having indicated intention to renounce his former allegiance (as he is required to do when the first step is taken), he cannot expect protection from the foreign state. Yet, not being a citizen, he is not entitled to American protection, should he go into a foreign country and become involved in controversy; and it has been ruled by the national executive that such protection will not be extended. If such a person goes abroad, therefore, he does so practically as a man without a country. As long as he remains in the United States, however, he is in certain respects better off than the alien. For example, he can acquire a homestead on the public lands, which no alien is entitled to do. And in certain parts of the country he is, if otherwise qualified, allowed to vote, although this questionable arrangement, found in as many as nine states a decade or two ago, exists today in only two.

Status during and after naturalization

Until recent years, an alien woman marrying a native-born or naturalized American citizen automatically became herself an American citizen, and, conversely, an American woman marrying an alien forthwith lost her citizenship. In other words, a married woman's status was determined entirely by that of her husband. In 1922, however, an act of Congress, prompted by growing recognition of the right of women to their own individuality as members

Citizenship of married women

¹ U. S. v. Thind, 261 U. S., 204 (1922).

² U. S. v. Cartozian, 6 Fed. Rep. (2nd), 919 (1925).

³ A. W. Parker, "The Ineligible to Citizenship Provisions of the Immigration Act of 1924," *Amer. Jour. of Internat. Law*, XIX, 23-47 (Jan., 1925).

⁴ On the anomalous situation arising from obligation of foreign military service on the part of many naturalized American citizens, see I. B. Oakley, "When Is a Citizen Not a Citizen?" *Atlantic Monthly*, CXXXV, 19-27 (Jan., 1925).

of the body politic, conferred full title to independent citizenship. Under this measure, an alien woman marrying an American citizen does not herself become a citizen unless she is made such by naturalization;¹ an American woman marrying an alien who would be eligible for naturalization does not lose her citizenship unless she chooses to renounce it; and an alien woman marrying an alien eligible for naturalization is not debarred from becoming an American citizen whether her husband does so or not. An American woman marrying an ineligible alien loses her American citizenship.²

The rights
of citizens
are both
limited
and con-
ditional

In an earlier chapter we have seen that all constitutional governments are limited; that they have only such powers as have been conferred upon them, or, at all events, have not been taken away from them; that various "rights" remain to the individual, not strictly as against the state, but certainly as against the government; that the delimitation of the government's powers and the definition of private rights are usually made in a written constitution, and form, indeed, the main uses of such an instrument.³ We have seen also that, while it is proper enough to speak of the individual's rights, a person, even though a citizen, has not absolute, or unqualified, rights as against the government under which he lives. The most solemnly guaranteed liberties, as of speech and religion, are, after all, valid and enforceable only in so far as they are not so used as to interfere with the equal rights of others, or to violate law, or to jeopardize the safety of the state. Bearing in mind these general limitations, we may briefly inquire what the rights of United States citizens are and upon what bases they rest.

Enumera-
tions of
rights

The first thing to be observed is that there is nowhere an enumeration of these rights which purports to be comprehensive or complete. The national constitution mentions a large number of them, particularly in the first eight amendments; but it expressly provides that "the enumeration . . . of certain rights shall not be construed to deny or disparage others retained by the people."⁴ Likewise, the state constitutions contain, as a rule,

¹ The process is, however, expedited in her case by omission of the formal declaration of intention and reduction of the period of residence from five years to one year.

² C. D. Hill, "The Citizenship of Married Women," *Amer. Jour. Internat. Law*, XVIII, 720-736 (Oct., 1924).

³ See Chap. VI.

⁴ Amendment IX. The absence of such provisions in the constitution as submitted to the states in 1787 was one of the main obstacles to ratification, and it is significant that of the twelve amendments adopted prior to the Civil War, nine were devoted to private rights.

bills of rights, in addition to scattered clauses touching the subject. But they do not attempt to be exhaustive. The state governments are like the national government in that their powers are confined to those which the people who created them have bestowed upon them. In both cases the people retain not only those liberties and immunities that have been expressly reserved to them, but all others not forbidden and not inconsistent with the instrument under which they are claimed. As a matter of fact, however, practically all private rights of any considerable importance find mention, express or implied, in the fundamental laws; and these alone call for comment here.

CHAP.
XII

Private rights is a complicated subject under all forms of government, but especially so under a federal system such as ours. There are rights in relation to the national government, rights in relation to the state governments, and rights in relation to both simultaneously; and rights in relation to the state governments rest upon provisions of the national constitution, or upon provisions of a state constitution, or upon provisions of both. To avoid confusion, it is best, therefore, to take note of rights in relation to national and state governments separately, even though in many instances they are similar or identical.

Various
categories
of rights

The rights that we have in mind pertain fundamentally to protection of either (a) personal liberty against arbitrary interference by governmental authorities, or (b) private property against confiscation or unlawful injury by such authorities. Taking up first the national government, we find some seven or eight main limitations in the interest of rights of a personal character. In the first place, Congress is forbidden by Amendment I to make any law "respecting an establishment of religion or prohibiting the free exercise thereof." The Supreme Court has held that this does not confer any right to violate a criminal statute in the name of religion; for example, it does not entitle a Mormon to practice polygamy.¹ But so long as there is no infraction of law, freedom of belief and worship must be unrestricted.

Rights of
personal
liberty in
relation to
the na-
tional gov-
ernment:

1. Freedom
of religion

In the second place, by the same amendment Congress is restrained from "abridging the freedom of speech or of the press." Cultural advancement and free government equally require full liberty of the people to engage in discussion, to write, and to print, and the makers of our constitutional system meant to prevent the rise of any censorship such as would stifle the interchange of

2. Freedom
of speech
and press

¹ Reynolds v. United States, 98 U. S., 145 (1878).

opinion and stop political criticism. No guarantee of a right better illustrates, however, the conditional basis on which all private rights ultimately rest. It was manifestly not intended that freedom of speech and press should extend to the incitement of insurrection, the encouragement of disobedience to law, the defamation of the government, or the instigation of foreign states to make war upon the United States; and the constitution had been in operation less than a decade before Congress passed a Sedition Act (1798) prescribing heavy penalties of fine and imprisonment for advising or attempting to procure any insurrection or riot, publishing "false and malicious writing against the government," or inciting any foreign power to make war upon the country. This particular measure flowed from an unfortunate outburst of Federalist partisanship, and after the Jeffersonian Republicans came into power they not only repealed it but liberated the prisoners held under it and secured a remission of the fines that had been paid. Legislation on similar lines has, however, been deemed necessary on several later occasions, particularly during periods of war. In the course of the Civil War the "war powers" of the government were construed to extend to the suppression of newspapers, the arrest and imprisonment of editors, and the punishment of speakers accused of encouraging rebellion or seeking to weaken the morale of the Unionist cause. And during the World War an Espionage Act of 1917 and a Sedition Act of 1918 laid heavy penalties, not only on all persons who, by speaking or writing, sought to turn sentiment against the war but on all who wrote, printed, or published any "disloyal, profane, scurrilous, or abusive" language about the constitution or form of government of the United States. Although held by many people to be both objectionable and unnecessary, these measures were vigorously enforced, and when tested in the courts were fully sustained. Normally, speech and press are free. But even in peace-time this freedom is not absolute; and in war-time it is certain to be sharply curtailed.¹

Still another guarantee contained in the first amendment is the "right of the people peaceably to assemble, and to petition the government for a redress of grievances." This right is deeply rooted in English and colonial experience, but it has none the less been the subject of notable controversies in the United States,

¹ The principal book on this subject—inspired by the experience of 1917-20—is Z. Chafee, *Freedom of Speech* (New York, 1921).

specially as to whether the right to present a petition involves the right to have it heard and considered.¹ It is clear enough now that no such deduction follows. Congress is flooded with petitions every year on all manner of subjects. They are received and referred to the appropriate committees, but pigeon-holed and rarely heard of afterwards. The same thing happens in parliamentary bodies everywhere.

CHAP.
XII

A fourth guarantee is immunity from bills of attainder.² A bill of attainder is a legislative measure which inflicts punishment without a judicial trial. The device was frequently employed in England during the political struggles of the seventeenth century, when not only were persons arbitrarily "attainted" of treason and sent to the scaffold by simple act of Parliament, but their descendants were made incapable of holding office and were in other ways shorn of civil rights. The authors of the American federal constitution felt that, aside from removal from office as a result of impeachment, punishments ought to be inflicted only in pursuance of the verdict of a court of proper jurisdiction. Hence nation and state alike are forbidden by the constitution to pass bills of attainders in any form.³ It may be added that the practice has gone out of use in almost all civilized countries.

4. Bills of
attainder
forbidden

Similarly, there is full immunity from ex post facto legislation. An ex post facto law, as defined by the Supreme Court, is one which "makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action;" or one which "aggravates a crime, or makes it greater than it was when committed;" or one which "changes the punishment, and inflicts a greater punishment than the law annexed to a crime when committed; or, finally, one which "alters the legal rules of evidence and requires less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender."⁴ Ex post facto legislation is therefore criminal legislation passed after the alleged crime was committed, which, if brought to bear against an accused person, would be to his disadvantage; and the enactment of such legislation is expressly forbidden to both the nation and the states. Retroactive legislation on civil matters, and retroactive criminal

5. Ex post
facto laws
forbidden

¹ This issue was especially prominent during the earlier stages of the abolition movement. See J. W. Burgess, *The Middle Period*, 253-296.

² Art. I, § 9, cl. 3.

³ *Cummings v. Missouri*, 4 Wallace, 277 (1866).

⁴ *Calder v. Bull*, 3 Dallas, 386 (1798).

CHAP.
XII

legislation which is not detrimental to an accused person, is, however, permissible.

6. Treason
defined in
the con-
stitution

In the next place, the citizen is relieved from any possible danger of being adjudged a traitor under some impetuous or partisan act of Congress; for treason is defined by the constitution, and Congress has no power to add to the definition. As so defined, it consists only in levying war against the United States or adhering to the country's enemies, giving them aid and comfort.¹ No person may be convicted of treason except on the testimony of two witnesses, or on confession in open court; and while Congress fixes the penalty, it cannot in doing so invalidate any inheritance of the traitor's property.²

7. Judicial
processes
restricted

An important group of restrictions in behalf of private rights has to do with proceedings against persons accused of crime under federal law. A person in civil life may be held to answer for "a capital or otherwise infamous crime" only on "a presentment or indictment of a grand jury;" in a criminal prosecution he is entitled to a speedy trial, by an impartial jury of the state and district wherein the crime has been committed; and he has a right to be confronted with the witnesses against him, to have counsel for his defense, and to avail himself of compulsory process for obtaining witnesses in his favor. No one, furthermore, may be compelled in any criminal case to be a witness against himself; no one may "be deprived of life, liberty, or property without due process of law;" excessive bail may not be required, or excessive fines imposed, or cruel and unusual punishments inflicted; and no one may be twice put in jeopardy of life or limb for the same offense. In civil suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury must be preserved. And, finally, the privilege of the writ of habeas corpus cannot be denied except when public safety, in times of rebellion or invasion, requires its suspension; that is, any person held by federal authorities must normally be given a preliminary hearing before a proper tribunal.³

"Due
process
of law"

In many ways, the most fundamental of these judicial guarantees is "due process." The Fifth Amendment forbids the national government, as just noted, to deprive any person of life, liberty, or property without due process of law. In 1868 the Fourteenth

¹ Art. III, § 3, cl. 1.

² *Bigelow v. Forrest*, 9 Wallace, 339 (1869).

³ Amendments V-VIII and Art. I, § 9, cl. 2. These provisions do not apply to cases arising in the army or navy, or the militia when in the active service of the United States.

Amendment imposed the same restriction upon the states. "Due process" has, therefore, become a palladium of individual rights as against all governmental authorities. Notwithstanding its importance—perhaps it would be better to say *because* of its importance—the phrase has never been officially or legally defined; and the attempt to apply it to the multifold actions and relationships of life has given rise to a stupendous amount of litigation. In his argument before the Supreme Court in the Dartmouth College case Daniel Webster asserted that due process is a principle according to which law "hears before it condemns, . . . proceeds upon inquiry, and renders judgment only after trial."¹ The jurist Cooley expressed the same idea when he said that "in each particular case [due process] means such an exertion of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs."²

CHAP.
XII

But the courts have not cared to attempt to frame any general definition. Rather, they have preferred, as the highest federal tribunal has said, that "the full meaning [of the phrase] should be gradually ascertained by the process of inclusion and exclusion in the course of decisions in cases as they arise."³ This attitude has been taken principally because the unending variety of forms assumed by the question as new situations come up makes it impossible to frame a definition that will long have any claim to exactness, and because the interests of justice and progress demand that this rule, preëminently, shall be kept flexible and adaptable. Besides, it may be observed that due-process questions usually come to the courts in such form as to call for only a negative sort of definition. An individual or a corporation objects to some action on the ground that due process has not been observed and that loss has been suffered on that account; and the thing that the court is called upon to determine is, not the scope of due process in general, but simply whether the action in question was or was not, so far as it went, due process.

Due process not defined by the courts

Due process, however, plainly forbids any judicial or quasi-judicial action against life, liberty, or property not carried out in accordance with the general rules established in our system of

What due process means in practice

¹ 4 Wheaton, 581 (1819).

² *Constitutional Limitations which Rest upon the Legislative Power of the States* (5th ed., Boston, 1883), 436.

³ *Twining v. New Jersey*, 211 U. S., 78 (1908).

jurisprudence for the security of private rights.¹ In relation to procedure, this means the hearing of every issue, before it is decided, by an authority vested with the appropriate power. It does not necessarily include exemption of an accused person from compulsory self-incrimination,² or the right of the accused to be confronted at the time of trial with the witnesses against him,³ or an opportunity to appeal from a lower to a higher court.⁴ In civil matters, the requirements of due process are regarded as having been met if the regular, recognized course of judicial proceedings has been observed.

Rights of
property
in relation
to the
national
government

The list of constitutional limitations in the domain of the national government designed to protect liberty of persons is thus long and imposing; and although war-time conditions—as in 1917-19—usually impose a severe strain upon the fabric, the protection which the citizen receives from this source is one of the most conspicuous features of our political system. Along with the protection of person goes protection of property. It is left to the states to say what constitutes property,⁵ but, taking property as defined by them severally, the national constitution throws round it—as do also the state constitutions on their part—a shield of protective stipulations. First of all, the due process clause, already mentioned, applies to deprivation of property, equally with that of life and liberty. In the second place, all duties, imports, and excises must be uniform, that is, must be made to fall upon the same kinds and amounts of property with equal weight, in all parts of the country.⁶ Third, Congress cannot impose any tax or duty on goods exported from any state.⁷ Fourth, no money may be drawn from the Treasury except in pursuance of “appropriations made by law.”⁸

Finally may be mentioned, as belonging in the same category, the limitations placed by the national constitution upon the exercise of the right of eminent domain. This right involves the power

¹ *Hagar v. Reclamation District*, 111 U. S., 701 (1884).

² *Twining v. New Jersey*, 211 U. S., 78 (1908).

³ *West v. Louisiana*, 194 U. S., 258 (1904). This right exists in the federal courts under the Sixth Amendment, but not in the state courts.

⁴ *McKane v. Durston*, 153 U. S., 684 (1894).

⁵ Save that through its exclusive power to grant patents and copyrights the national government can practically define property in inventions and publications. The only restriction upon the states in this matter is that, under the Fifteenth Amendment, they cannot establish or recognize property in man or man's labor, *i.e.*, slavery or involuntary servitude.

⁶ Art. I, § 8, cl. 1.

⁷ Art. I, § 9, cl. 5.

⁸ Art. I, § 9, cl. 7.

to take private property for public use, with or without the owner's consent. The power is one which every government must have. In the absence of constitutional restraints, however, it would be peculiarly liable to abuse: the compensation might be inadequate, —indeed, compensation might be denied altogether. Hence, the Fifth Amendment forbids private property to be taken for public use without just compensation. The courts, it is true, have usually interpreted this provision very broadly. For example, they uphold the taking of land not only for purposes which are strictly governmental, *e.g.*, the erection of a custom-house, but for purposes which have any clear relation to governmental functions, *e.g.*, the creation of a park; and they raise no objection to the exercise of the power by a railroad or other corporation upon which the government has bestowed it, so long as the same conditions are observed which the government itself would be required to meet. Nevertheless, it is always necessary to show that the purpose is "public," and to make "just compensation." What is to be considered just compensation is likely to be a matter for judicial or administrative determination. The government or corporation will ordinarily make the owner an offer. This is very likely to be refused. Counter-proposals and mutual concessions may lead to an agreement, as in an ordinary sale. But if they do not, the owner can appeal to the courts, which will fix the amount which he may receive and must accept; or the decision may be reached by commissioners or other administrative boards. All that is necessary to meet the requirements of the constitution is that the dissatisfied seller shall have an opportunity to be heard on the subject and to present such evidence concerning the value of his property as he may desire to bring forward.¹

Extensive as they are, the enumerations thus far given do not exhaust the resources of the national constitution in the protection of private rights. They have to do entirely with guarantees of private rights as against the national government. But the citizen has protection also as against the government of his state; and while his immunities in this direction rest to a considerable extent upon provisions of the constitution of that particular state, they also flow in part from restrictions which the national constitution itself imposes upon all of the states.

First among these restrictions is the obligation to recognize and uphold interstate citizenship, which means, as we have already

CHAP.
XIIEminent
domainProtection
of rights
in relation
to state
govern-
ments

¹ United States *v.* Jones, 109 U. S., 513 (1883).

CHAP.
XII

No law
abridging
privileges
of citizens
of United
States

seen, that a state may not discriminate, in favor of its own citizens, against persons coming within its jurisdiction from other states.¹ In the second place, the Fourteenth Amendment forbids the states to make or enforce any law abridging the privileges or immunities of citizens of the United States." Inasmuch as practically all citizens are citizens of state and nation simultaneously,² the benefit of both of these provisions accrues to substantially the whole body of the people; and, taken together, they confer, among other things, the right to move freely from state to state; to establish a residence in any state, and to be dealt with like other residents there, to own personal and real property in any state; to sue in the federal courts and in the courts of the state in which one resides; to have free access to the state government and hold its offices if duly elected or appointed thereto; and to have the protection of the state government no less than that of the national government, within its proper sphere, and equally with all other persons within the state's jurisdiction. This last-mentioned guarantee of equality of treatment is, indeed, separately and specially stipulated in a clause of the amendment referred to.

Other re-
strictions

One who has read that portion of Chapter XI above dealing with constitutional limitations on the states will easily recall other restrictions which designedly or incidentally protect private rights against state action. There is, for example, the prohibition of legislation impairing the obligation of contracts, a restriction which, as has been explained, applies only to the state, and not to the national, government.² There is also the prohibition of bills of attainder and of ex post facto laws—in these cases, restraints which fall equally upon the government of state and of nation. And to the stipulation of the Fifth Amendment that the national government shall deprive no person of life, liberty, or property without due process of law, the Fourteenth Amendment, as has been pointed out, adds an identical limitation upon action by the states.

"Due
process" in
relation to
the states

This matter of due process is, in fact, considerably more important in relation to the state governments than to the national government. This is because the former, in the main, exercise that wide range of authority which we designate as the police power, and because the exercise of this power is peculiarly liable to contravene the principle of due process, or at all events, to bring it

¹ See pp. 151-152 above.

² See pp. 149-150 above.

into question.¹ The matter is the more troublesome for the reason that, just as the courts refuse to attempt any general definition of "due process," so they find it impracticable to mark out any very definite boundaries for the police power, preferring, rather, to decide when controversy arises whether any given act is to be construed as coming within the scope of that power. Usage, however, establishes the view of the police power as extending to the exercise of substantially all regulatory authority designed to promote the general well-being, as distinguished from the well-being or privilege of certain individuals or groups; and among the commonest concrete applications of the power are laws on sanitation, on public morals, on dangerous or objectionable trades, on zoning and housing, on railways and other common carriers, on hours of labor and minimum wages. When, however, a state undertakes to regulate the rates and services of public utility corporations, or to protect the health of women and children by restricting the number of hours per week they can lawfully be employed in a factory, or to restrain citizens from making use of their property in ways considered deleterious to public health or morals, it is not unlikely to find itself accused of having deprived individuals or corporations of liberty or property, or both, without due process of law; and, a test case being brought, it will remain for the courts to determine whether or not the objection was well founded. Manifestly, great latitude of judgment is open to the judicial authorities in handling cases of this type. So far as the judges are concerned, due process is undefined; the police power is likewise undefined; and the variety of circumstances that may have to be taken into account is limitless. The personal opinions, susceptibilities, and social philosophies of the judges, therefore, have profound influence upon the decisions rendered, and a court today may take a position diametrically opposite to that taken by it at an earlier time. It is not merely a question of settling disputes at law; it is a matter of fixing public policy.

Speaking broadly, the Supreme Court, in passing upon due process cases, has held the states within narrower bounds in exercising their police power than they would have been likely to observe of their own accord. Thus when the legislature of New

CHAP.
XII

The Supreme Court and due process cases

¹Due process is involved also, of course, in the exercise of the taxing power. So applied, it means that property may not be taken from a person by taxation unless general notice is given and an opportunity offered for complaint to be lodged and heard. A hearing is not, however, necessary in the case of poll taxes and certain others.

York at the beginning of the century passed an act forbidding employees to work in bakeshops more than sixty hours a week or ten hours a day, the Court held the measure unconstitutional, on the ground that it was an "unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to labor."¹ This "right and liberty," it was considered, had been taken away in contravention of due process; although, twelve years later, an Oregon law restricting the hours of labor in manufacturing establishments to ten, and applying to both sexes, was upheld.² Again, when the legislature of Kansas sought to make it a misdemeanor for an employer to threaten to discharge an employee because he was a member of a trade union, the Court pronounced the statute invalid.³

Still again, when Arizona undertook to forbid the issuance of injunctions in labor disputes in certain circumstances, the measure was overthrown.⁴ A District of Columbia minimum wage law was declared invalid in 1923,⁵ and an Oregon law of similar nature was sustained in 1917 only by the narrowest possible margin, *i.e.*, a four-to-four division of the Court.⁶ In applying the due process clause to state legislation, the Supreme Court therefore wields a great amount of control over the whole development of industrial and other economic legislation; and dissatisfaction with the pre-vaillingly conservative use which is made of this authority has become a main impetus to the demand so frequently heard in our day for a curbing of the tribunal's powers.⁷

Finally, as has been pointed out, private rights are not wholly dependent upon protection guaranteed by the national constitution as against (a) the national government and (b) the states. The states themselves add numerous guarantees of their own accord, each in relation exclusively, of course, to the actions of its own legislature and officials. This they do largely through the medium of the bills of rights contained in their constitutions, interpreted and amplified by statutes and judicial decisions; and if the citizen of New York or Illinois wants to know what the sum

Private
rights
guaranteed
also by
the states

¹ *Lochner v. New York*, 198 U. S., 539 (1905).

² *Bunting v. Oregon*, 243 U. S., 426 (1917).

³ *Coppage v. Kansas*, 236 U. S., 1 (1915). Similar laws of fourteen other states were made void by this same decision.

⁴ *Truax v. Corrigan*, 257 U. S., 312 (1921).

⁵ *Minimum Wage Board v. The Children's Hospital*, 261 U. S., 525 (1923). This law was, of course, passed by Congress, in its capacity of legislature for the District.

⁶ *Stettler v. O'Hara*, 243 U. S., 629 (1917).

⁷ See pp. 446-448.

total of his rights is, he must put the voluntary guarantees of his own state into the list along with those guarantees which come to him from the national constitution.

CHAP.
XII

With forty-eight different systems of state-determined private rights in operation—overlaid as they are with the nation-wide system described above—our general scheme of rights becomes exceedingly complex. To a considerable extent, however, the matters on which the state constitutions offer protection as against the state governments are the same as those on which the national constitution affords protection as against the national government. For example, while the guarantee of freedom of religion mentioned above is made only in relation to the national government, practically all of the states, on their own part, set up guarantees of similar or identical nature. The First Amendment forbids only Congress to make any law abridging freedom of speech and press. So far as this provision goes, therefore, any state is free to impose such restrictions as it likes, and, as every one knows, public speakers are often arrested and publications suppressed by municipal and other local officials acting under state authority. Most of the states, nevertheless, have guarantees of their own on these matters. So it is with the right of assembly, of petition, and of judicial or administrative relief in cases involving exercise of the power of eminent domain: the provisions of the national constitution apply only as against the national government, and the states severally supply such guarantees on their own part as they desire. So it was, indeed, with even the supremely important guarantee of due process until 1868, when, as has been pointed out, the Fourteenth Amendment laid upon the states for the first time the same obligations in this respect that the Fifth Amendment had imposed upon the national government practically from the beginning. A salient effect of the Fourteenth Amendment was, in fact, to extend the reach of the national government, in the protection of private rights as in a number of other respects, far out into the domain previously occupied by the states independently; and consequently the range of initiative and choice on the part of the states in dealing with private rights—particularly in relation to economic organization and life—has become decidedly narrower than in earlier days.

Illustrations

REFERENCES

1. CITIZENSHIP

- C. K. Burdick, *The Law of the American Constitution* (New York, 1922), Chap. XI.
- W. W. Willoughby, *Constitutional Law of the United States* (New York, 1910), I, Chaps. XVI-XVIII.
- B. A. Arneson, *Elements of Constitutional Law* (New York, 1928), Chap. XVIII.
- F. A. Cleveland, *Organized Democracy* (New York, 1913), Chaps. VIII, IX.
- A. J. Lien, *Privileges and Immunities of Citizens of the United States* (New York, 1913).
- J. P. Gavit, *Americans by Choice* (New York, 1922).
- F. Van Tyne, *Citizenship of the United States* (Rochester, 1904).
- , *The Law of Naturalization of the United States* (Washington, 1907).
- J. S. Wise, *Treatise on American Citizenship* (Northport, 1906).
- C. Brinkman, *Recent Theories of Citizenship in its Relation to Government* (New Haven, 1927).

2. PRIVATE RIGHTS

- H. L. McBain, *The Living Constitution* (New York, 1927), Chap. III.
- A. B. Hart, *Actual Government as Applied under American Conditions* (New York, 1906), Chap. II.
- F. A. Cleveland, *Organized Democracy* (New York, 1913), Chap. VII.
- C. K. Burdick, *The Law of the American Constitution* (New York, 1922), Chaps. XXVII-XXXIII.
- C. S. Wallace, *Our Governmental Machine* (New York, 1924), Chap. X.
- J. W. Burgess, *Political Science and Comparative Constitutional Law* (Boston, 1891), I, 184-252.
- E. McClain, *Constitutional Law in the United States* (New York, 1905), Chaps. XXXVI-XLVI.
- F. J. Stimson, *The American Constitution as it Protects Private Rights* (New York, 1923), Chap. V.
- T. M. Cooley, *Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States* (Boston, 1883), Chaps. IX-XIII.
- E. Freund, *The Police Power* (Chicago, 1904).
- H. Brannon, *The Rights and Privileges Guaranteed by the Fourteenth Amendment to the Constitution* (Cincinnati, 1901).
- Z. Chafee, *Freedom of Speech* (New York, 1921).
- R. H. Eliel, "Freedom of Speech," *Amer. Polit. Sci. Rev.*, XVIII, 712-736 (Nov., 1924).
- L. P. McGehee, *Due Process of Law under the Federal Constitution* (Northport, 1906).
- R. L. Mott, *Due Process of Law* (Indianapolis, 1926).
- The Constitution of the United States of America as Amended to December 1, 1924* (68th Cong., 1st Sess., Sen. Doc. No. 154), 565-633. Annotation of Amendments I-IX.

CHAPTER XIII

CONSTITUTIONAL DEVELOPMENT

As it came from the hands of its authors in 1787, the national constitution was a concise, well-phrased document setting forth in bold outline an experimental scheme of government designed to supersede a plan that had proved inadequate. The new venture succeeded beyond the hopes of most men, and in the main the written instrument which Washington swore to "preserve, protect, and defend" is still the formal, tangible palladium of national authority, order, and liberty. A few brief passages have been rescinded, and enough new matter has been added to fill four or five pages of print. But the biography of the constitution, considered simply as a document, makes up a relatively brief chronicle; the "bundle of compromises" survives almost intact.

The
changing
constitu-
tion

Elsewhere, however, we have emphasized the fact that—outside of Oriental sacerdotal despotisms, at all events—men do not permit themselves to be governed long by unchanging formulæ of past generations.¹ The expanding needs of progressive societies demand continual readjustments of creeds, social habits, and political forms. Nowhere is this more true than in a developing country like the United States, where changes of population, wealth, economic life, and intellectual outlook create a new world almost with every passing generation. It is hardly necessary to say, therefore, that the rather remarkably static written constitution of 1789, as one picks it up and scans it today, does hardly more than set up guide-posts marking points of departure from which the development of the actual working constitution, in the larger meaning of the term, has proceeded; and while any study of the making of this greater constitution of today must start with a review of the textual amendments of the original fundamental law, it must quickly advance to a fuller consideration of the wealth of principles and rules which flow from statutory elaboration, from judicial interpretation, and from usage or custom. Every generation molds the

¹ See p. 26.

CHAP.
XIIIProvisions
for
amendment

actual, working constitution to conform to its own ideas and to suit its peculiar needs.¹

The framers of the instrument of 1787 were far from believing their handiwork perfect. Furthermore, they were sufficiently statesmanlike to know that, however satisfactory the written constitution might be at the moment, unforeseen developments would be likely to require alterations in it. On the other hand, they did not want the process of amendment to be so easy as to encourage frequent and ill-considered change. Accordingly, they devised alternative methods, as follows: "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress."² At one stage of the convention's deliberations Roger Sherman suggested that the consent of all of the states should be required for ratification. This, however, would have meant to perpetuate the mistake made in the Articles of Confederation; and when James Wilson brought forward a counter-proposal that the assent of only two-thirds should be required, a compromise was effected on the present basis of three-fourths.

State re-
quests for
a conven-
tion

Although two methods of initiative and two methods of ratification are provided for, all amendments thus far adopted have been proposed and ratified in the same way: all have been proposed by Congress and ratified by the state legislatures. This does not mean, however, that there have not been plenty of attempts to bring the alternative method into play. Considerably more than two-thirds of the state legislatures have at one time or another appealed to Congress to call a convention. Sometimes a very definite amendment was in view, as in more than two score instances in which the thing aimed at was the popular election of United States senators, or as in the most recent instance of the kind (a petition from Nevada in 1926), looking to the repeal of the Eighteenth Amendment. Sometimes the object was more general, as in the appeals

¹ Speaking broadly, the state constitutions have developed in the same ways, although formal amendment, including total revision, has played a relatively more important rôle.

² Art. V.

made by different states at the time of the nullification controversy of 1832, and again in 1859-60 when civil war was impending. The argument has lately been advanced, by opponents of the Eighteenth Amendment chiefly, that every such appeal made at any time by a state should be regarded as still pending—which would mean that the necessary two-thirds has been attained and that it is now incumbent on Congress to proceed to call a convention. This fantastic view, however, is not generally held; even though it must be admitted that there has never been any official determination of the period of time at the end of which an appeal from a state shall be regarded as having lapsed. There is no reason to expect that two-thirds of the states will ever request a convention simultaneously, or even approximately so. On one point there is rather general agreement, *i.e.*, that no matter for what specific purpose called, a convention, once set up, might go as far as it liked in framing proposed changes in the constitution, and might even put before the country an entirely new instrument.¹

CHAP.
XIII

When voted by a two-thirds majority in both houses,² a proposed amendment is transmitted by the secretary of state to the governors of the several states, to be laid by them before the legislatures. Reports of the action taken are sent, in turn, by the governors to the State Department, which, if and when the necessary three-fourths majority is obtained, proclaims the amendment effective as a part of the constitution.³ A proposal failing to get the support of three-fourths of the states continues "outstanding;" its rejection is never officially proclaimed, and states that have rejected it or have failed to act may approve it at any time. On the other hand, by decision of Congress, a state that has once ratified cannot change its action. Ohio and New Jersey undertook to withdraw their ratification of the Fourteenth Amendment, and New York and other states tried the same thing in connection with the Fifteenth. But Congress directed the secretary of state to treat the initial actions as final and to proclaim ratification despite attempted revocation. Unlike statutes, amendments are not subject

Actual
mode of
amendment

¹ W. B. Wheeler, "Is a Constitutional Convention Impending?" *Ill. Law Rev.*, XXI, 782-803 (Apr., 1927).

² The question of whether this means two-thirds of a quorum or two-thirds of the entire membership remained in doubt until passed upon by the Supreme Court in the National Prohibition Cases in 1920 (253 U. S., 350). The Eighteenth Amendment had been proposed by vote of less than two-thirds of the entire membership of the House of Representatives, and the attempt was being made to upset it on that ground. The court held that the provision of the constitution contemplates only two-thirds of a quorum.

³ *Rev. Stat. of U. S.*, § 205; G. Hunt, *The Department of State*, 168-178.

at any stage to veto by the president;¹ and, aside from a restriction pertaining to the slave trade which expired in 1808, no restraint is imposed upon the amending power, save that no state may, without its consent, be "deprived of its equal suffrage in the Senate."²

The states were not yet safely gathered under the "New Roof," as the constitution was popularly called in the early days, before proposals began to be made for "extensions of the eaves," and other more or less drastic alterations. Altogether, more than 1,300 proposed amendments were put before Congress by joint resolution during the first hundred years of the constitution's history, and over 1,300 others found their way to the clerks' tables between 1889 and 1926.³ Nowadays, anywhere from forty to seventy-five proposals are presented in the prescribed form during an average session. The total number of amendments actually endorsed by the two houses from 1789 is, however, only twenty-four, and the number ratified by the states only nineteen. Indeed it would not be far wrong to say that only nine actual amendments have been adopted, because the first ten so-called amendments were, to all intents and purposes, contemporary addenda to the original constitution rather than amendments of a finished document.

As submitted for ratification in 1787, the new fundamental law was almost entirely lacking in provisions (numerous enough in the state constitutions) for the protection of private rights. The deficiency was immediately noted, and it became a main obstacle to the instrument's prompt acceptance. Hamilton argued in *The Federalist*⁴ that, on account of the limited powers granted the national government, no guarantees of the kind were needed. But most people were of a different opinion, and the ratifying conventions in seven of the states formally proposed amendments, mainly on this subject, to an aggregate number of one hundred and twenty-four. Madison was elected to the first Congress under pledge to use his influence to bring about the adoption of a "bill of

¹ For the obvious reason that the same majority in Congress which can propose an amendment suffices to override a veto. The Supreme Court ruled on the point in 1798 in the case of *Hollingsworth v. Virginia* (3 Dallas, 378).

² In the National Prohibition Cases, cited above, an attempt was made to show that there are implied limitations upon the power to amend; but the court refused to accept this view. See C. K. Burdick, *Law of the American Constitution*, 45-48.

³ The proposals of 1789 to 1889 are classified and described in the monograph by H. V. Ames listed on p. 196 below. The proposals between 1889 and 1926 are similarly classified in Sen. Doc. No. 93, 69th Cong., 1st Sess. (1926).

⁴ No. LXXXIV.

rights," and in June, 1789, he introduced a long series of proposals looking to that end. Of seventeen amendments voted by the House, twelve were endorsed by the Senate, and ten were ratified by the states. Eight of them embodied the desired guarantees of personal and property rights; the ninth provided that the enumeration of certain rights in the constitution shall not be construed "to deny or disparage others retained by the people;" and the tenth was intended to clear up doubts concerning the distribution of powers between the national and state governments. To all intents and purposes, these ten amendments, as has been stated, belong to the main body of the written constitution, and much trouble would have been saved if they had been incorporated in it at the outset.

CHAP.
XIII

The next two amendments were adopted to correct defects which came to light early in the constitution's history. In the case of *Chisholm v. Georgia* the Supreme Court held, in 1793, that a citizen of one state could sue another state in the federal courts. To people of strong states' rights views this was shocking doctrine, and under their influence the Eleventh Amendment was adopted, in 1798, declaring that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The prohibition is construed to apply also to suits against a state by its own citizens when brought in the federal courts.

Eleventh
Amend-
ment

Whether this amendment was necessary depended on the point of view. But the threatened breakdown, in 1800, of the system of electing the president, because of a tie between Jefferson and Burr, brought a change whose necessity no one could deny. The upshot was the Twelfth Amendment, ratified in 1804, and providing for separate votes for president and vice-president.¹

Twelfth
Amend-
ment

The first half of the nineteenth century saw vigorous constitution making and revision in the states. But, apart from the amendment just mentioned, no change was made in the national written constitution, notwithstanding that several hundred proposals made their appearance in Congress. Then came the Civil War, and as a result of it three amendments designed primarily to define and protect the status of a body of people newly injected into the citizenship of the republic, *i.e.*, the freedmen. These were: the Thirteenth (1865), prohibiting slavery; the Fourteenth (1868), defin-

¹ See pp. 210-211.

CHAP. DEF
XIIIThirteenth,
Fourteenth,
and Fifteenth
Amend-
mentsSixteenth
Amend-
ment

(14) ing citizenship, farther safeguarding private rights, altering the basis of representation in Congress, and laying disabilities on ex-officials guilty of rebellion against the United States; and the Fifteenth (1870), restraining the states from abridging or denying the suffrage on account of race, color, or previous condition of servitude.

Forty-three years now passed without farther alteration of the written fundamental law. Political and social ideas, however, underwent important changes, and of late these reconstructed views, reënforced by influences arising from the experience of the country in the World War, have led to a new and remarkable series of constitutional amendments. Barred from laying a tax on incomes by a decision of the Supreme Court in 1895 pronouncing an income tax section of a revenue law of 1894 unconstitutional,¹ Congress, in 1909, submitted to the states a proposal that the federal legislature be authorized to "lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration;" and in 1913 this provision—the basis of our present federal tax on incomes—was added to the constitution as the Sixteenth Amendment. It will be observed that the amendment does not say whether an income tax is or is not a direct tax; it simply authorizes such a tax to be laid independently of the apportionment restriction elsewhere imposed on direct taxation. In point of fact, the Supreme Court has since declared that a tax on incomes must be regarded as a tax on the use of property to produce the income and is, therefore, in its nature an excise tax.

The Seventeenth Amendment, providing for direct popular election of senators, dates also from 1913. This mode of election found few supporters in the convention which framed the original constitution. But it began to be earnestly advocated as early as 1826, and after the Civil War the question drew the attention of steadily increasing numbers of people. From 1893 onwards the House repeatedly passed resolutions favoring the change. The Senate held out until 1911. In 1912, however, the amendment was carried through, after the two houses succeeded in composing their differences on the amount of supervision to be exercised over sena-

¹ Pollock v. Farmers' Loan and Trust Company, 157 U. S., 429 (1895). Construing an income tax to be a direct tax, the court held it unconstitutional for the reason that by its nature this tax cannot be apportioned among the states "according to their respective numbers," as is required of all direct taxes by the constitution. Art. I, § 2.

Seven-
teenth
Amend-
mentIncome
tax

torial elections by the national government, and in 1913 it became effective.

CHAP.
XIII

Eighteenth
Amend-
ment

The remaining two amendments closely followed the World War and were helped to success by war-time experiences. One, the Eighteenth, in effect, abolished the liquor traffic; the other, the Nineteenth, nationalized woman suffrage. The movement to suppress the transportation and sale of intoxicating liquors had long been going on, and by the time when the United States entered the World War eleven states had constitutional prohibition, ten had statutory prohibition, and five others were about to pass under prohibition laws or amendments. Early in 1917 Congress forbade the manufacture and importation of all spirituous liquors for beverage purposes during the period of the war; and in December of the same year a constitutional amendment was submitted to the states providing that "after one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is prohibited." Ratified by the requisite number of states, this amendment was proclaimed a part of the constitution in January, 1919, and was duly put into effect on January 1, 1920. The amendment roused bitter opposition and was tested from every angle before the courts.¹ But it was sustained; and the steady growth of the regulatory powers of the nation, at the expense of the states, received fresh illustration. This amendment was unique, too, in fixing a period (seven years) within which it must be ratified by the states in order to become operative.²

The antecedents of the Nineteenth Amendment, dealing with woman suffrage, will be described when we come to consider the development of the electorate.³ A resolution submitting the amendment in the form in which it was finally adopted was passed by the House of Representatives early in 1918. Despite earnest support by President Wilson, it was twice defeated by the Senate, mainly through the influence of southern members who felt that the question was one to be settled by each state for itself. In the early summer of 1919, however, the two houses came into agree-

Nineteenth
Amend-
ment

¹ For a summary of the first cases to arise see *Amer. Polit. Sci. Rev.*, XIV, 648-654 (Nov., 1920).

² This feature was upheld by the Supreme Court in the case of *Dillon v. Glass*, 256 U. S., 368 (1921).

³ See Chap. XXXI.

ment, and ratification by the states proceeded with such rapidity that on August 26, 1920, the secretary of state was able to proclaim the amendment a part of the fundamental law. The new suffrage arrangements were, accordingly, effective in the national and state elections of that year. Like the Fifteenth Amendment, and in almost the same words, the new article restricts the control of the states over the suffrage—in the present case, by forbidding the right of citizens of the United States to vote to be denied or abridged by the states (or by the United States) on account of sex.¹

Criticism
of the
amending
process:

Madison believed that the modes of amendment agreed upon by the framers guarded "equally against that extreme facility which would render the constitution too mutable and that extreme difficulty which might perpetuate discovered faults."² On the whole, history has borne out this opinion. There has, nevertheless, been much criticism of the amending process, chiefly on two grounds, (1) that it is too slow and difficult, and (2) that it is too far removed from direct action of the people. Believing with John Marshall that the machinery is "unwieldy and cumbrous," members of Congress began as early as 1864 to introduce resolutions looking to amendments reducing the majorities required for submission to the state or for ratification, or for both; and since 1900 such proposals have been especially numerous. Twenty years ago it was rather generally supposed that no more amendments could be secured unless the amending process was itself changed. The adoption of four amendments of wide economic and social import within the space of seven years has proved the fallacy of this assumption. Nevertheless, the demand for an easier and more

1. On
ground of
slowness
and
difficulty

¹ Among amendments now (1928) being pushed more or less actively is one sponsored by ex-Senator Wadsworth making some changes in the procedure of constitutional amendment; one moving back the inauguration of the president and the convening of Congress to dates nearer election time than now (see p. 357); one proposed by the Treasury Department in 1923 subjecting to national taxation all securities issued in the future by the states and their subdivisions; and one (the "equal rights" amendment), specially urged by the National Woman's party, striking away all legal discriminations against women as such, on lines similar to the Sex Disqualification Act in Great Britain in 1919. An amendment empowering Congress to "limit, regulate, and prohibit" child labor, proposed by Congress in 1924, failed to be ratified by any considerable number of states. For an interesting, even if not wholly convincing, argument that the constitution ought now to be revised as a whole, see W. MacDonald, *A New Constitution for a New America* (New York, 1921), Chaps. XIX-XX. The only means of doing this would be a national convention called by Congress at the request of the legislatures of two-thirds of the states. Cf. pp. 180-181 above.

² *The Federalist*, No. XLIII (Lodge's ed.), 275.

expeditious process continues. To the argument that the woman suffrage amendment was carried about as soon as public opinion was prepared for it, and that the prohibition amendment was adopted with remarkable celerity, considering the innovations of policy and the difficulties of administration which it entailed, the rejoinder is offered that a generation elapsed after the income tax law of 1894 was declared unconstitutional before an amendment authorizing such a tax could be got through, notwithstanding insistent public demand for a redistribution of tax burdens between the agricultural classes on the one hand and the manufacturing and commercial elements on the other; also that the amendment authorizing the direct popular election of senators was adopted eighty-seven years after it was first proposed, long after sentiment had widely crystallized in its favor, and, indeed, after numerous states had brought into use extra-constitutional means of attaining the desired object.¹

CHAP.
XIII

The second criticism, somewhat related to the foregoing, is that the amending process is undemocratic, in that the people have no direct part in it. Public opinion may lead Congress to put an amendment before the states, and may influence the legislatures to endorse or reject it. But, contrary to the arrangements made for amending most of the state constitutions, the people do not themselves either initiate amendments or vote on them. Years ago it was pointed out that it was mathematically possible for 673 state senators and 1,643 representatives—that is, 2,316 legislators out of a total legislative membership of 7,400—to carry a proposed amendment in the thirty-six states requisite for ratification, and, on the other hand, that the representatives of one-tenth of the people, living in thirteen thinly settled western states, could defeat an amendment desired by the remaining nine-tenths.² Today, one-twentieth could frustrate the will of nineteen-twentieths.

2. On
ground of
undemo-
cratic
character

Experience shows that it is decidedly more difficult to procure the submission of amendments by Congress than to bring about their ratification by the states. Most of the proposals for change

¹ It is observed, too, that the Sixteenth Amendment, before finally becoming part of the constitution, was introduced in Congress forty-two times, the Seventeenth almost two hundred times, the Eighteenth more than fifty times, and the Nineteenth almost one hundred times. On the general question see M. A. Mussman, "Is the Amendment Process too Difficult?" *Amer. Law Rev.*, LVII, 694-705 (Sept.-Oct., 1923); J. Miller, "Amendment of the Federal Constitution: Should it be Made More Difficult?," *ibid.*, LX, 181-205 (Mar.-Apr., 1926); and T. F. Cadwalader, "Amendment of the Federal Constitution," *ibid.*, LX, 389-402 (May-June, 1926).

² *Cong. Record*, 67th Cong., 4th session, pp. 5387-5388.

CHAP.
XIIIProposed
changes

now current look, however, to both the easing up of the requirement for submission and the popularizing of the mode of ratification; and many of them follow the main lines of a plan brought forward by Senator La Follette in 1912 providing (1) that an amendment should be submitted (a) if approved by a simple majority vote of both houses of Congress, or (b) if proposed by the legislatures of any ten states, or (c) if initiated by the voters of any ten states, and (2) that, however proposed, an amendment should be subject to ratification, not by the legislatures, but by a majority of the popular vote on it in a majority of the states, provided that this aggregated a majority of the votes cast on the measure throughout the country as a whole. Ratification would thus be by popular referendum, already extensively employed in a similar way in the states; and it is interesting to observe that Ohio, in a constitutional amendment of 1918, sought to require that ratifications by that state should be only in pursuance of referenda; although the Supreme Court has held this requirement inconsistent with the national constitution.¹

Major
changes
not
probable

Change in the fundamentals of the existing amending process seems at this time improbable. The experience of the past fifteen years has created a rather distinct impression that the constitution can, after all, be altered quite easily enough, and in fact an increasing number of proposals look to slowing up, if not otherwise making more difficult, the amending process, especially as it pertains to ratification. It is pointedly observed that the national constitution performs a function essentially different from that of the state constitutions, and should be less flexible than they; this function being primarily that of drawing a line between national and state powers—a line which, in so far as the written constitution can control it, is, and should be, subject to only infrequent variations. And it is widely felt that, if the national amending machinery moves slowly, it moves no more so than is

¹ The Democratic national platform of 1924 said: "We favor granting the right to the people of the several states to vote on proposed constitutional amendments." In the same year the House judiciary committee reported an amendment providing (1) that the members of at least one house in each of the legislatures which may ratify constitutional amendments shall be elected after such amendments have been proposed, (2) that any state may require that ratification by its legislature be subject to confirmation by popular vote, and (3) that, until three-fourths of the states have ratified or more than one-fourth of the states have rejected or defeated a proposed amendment, any state may change its vote. Cf. W. A. Robinson, "Advisory Referendum in Massachusetts on the Child Labor Amendment," *Amer. Polit. Sci. Rev.*, XIX, 69-73 (Feb., 1925).

desirable, for otherwise some of the innumerable ill-considered proposals that are offered would probably be adopted. Once an amendment is in the constitution, it is there practically forever, and it is best that the people consider carefully and long whether they really want it. Much could be said for fixing a time limit within which the process of ratification must be completed. But this can be done without an amendment, and, as we have seen, was actually done in the case of the prohibition amendment. It would be an improvement if amendments were acted on in the states only by legislatures elected subsequent to submission, so that the people might have the proposals before them when electing their senators and representatives. But the states can apply this principle now if they so desire. Better even than this would probably be the use, as ratifying agencies, of conventions in the states, rather than the legislatures; for the legislature is necessarily elected primarily with reference to state affairs, and a specially chosen convention would yield the substantial benefits of the referendum plan without involving its disadvantages. But this again would require no constitutional amendment, being an alternative device for which the constitution already provides. And if it should be objected that ratifying conventions would entail a good deal of expense, it might be replied that amending the fundamental law is a poor matter upon which to economize.

In the United States, as in other lands, the formal written constitution is only the core of a great body of regulations which have to do with the organization and workings of government. Statutory amplification, judicial interpretation, custom—these furnish a very large part of constitutional law as it actually operates; and through them the constitution—using the term in the broad sense—grows far more extensively than through textual alterations of the fundamental document. Statutory elaboration is very common and very important. The framers of the original constitution, being desirous of avoiding what one of them called “a too minutious wisdom,” outlined quite distinctly the framework of the new government, but wisely left the details, both of organization and of functions, to be filled in by Congress and by the state legislatures. For example, they assumed the existence of executive departments and twice referred in the constitution to the heads of these departments, but they left Congress not only to establish the departments but to determine how many there should be, what they

Growth by
statuteIllustra-
tions

should be called, how they should be organized, and what should be their functions and interrelations. Other great administrative devices, standing outside of the executive departments, *e.g.*, the Interstate Commerce Commission and the Federal Trade Commission, have originated in the same way. The composition of the two houses of Congress was carefully prescribed, but the time, place, and manner of electing both senators and representatives were left to be fixed by the state legislatures, subject to control by Congress itself;¹ and in a great statute of 1842 on the election of representatives and another of 1866 on the election of senators, Congress amplified the constitutional law of this subject in much detail. Again, the judicial power of the United States was vested in "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."² Aside from the Supreme Court, therefore, the entire federal judicial establishment rests on statutes passed from time to time at the discretion of Congress.

In short, a very large part of the actual, working governmental system has been created, and may at any time be added to or altered, by ordinary legislative process. The French have a special term for statutes which, while forming no part of the constitutional laws (*i.e.*, the written constitution), are yet something more than ordinary statutes, in that they deal with the distribution and exercise of governmental powers. They call such measures "organic laws." We have no special name for them. But we rely heavily upon them as a means of keeping the constitution abreast of the ever-changing necessities of political life.

Growth by
judicial
interpreta-
tion

A still more important means of constitutional growth is judicial interpretation. How such interpretation comes about is not difficult to see. Congress, or a state legislature, passes a law, or a national or state official performs an act, whose validity is challenged by some citizen or group of citizens adversely affected. A case is brought into the courts and the law or action is attacked as being unconstitutional; whereupon the judges must decide whether the charge is well based—in other words, whether the measure is or is not in accordance with constitutional provision. To do this, it is, of course, necessary to determine what the pertinent constitutional provisions mean; and this high task the courts boldly and habitually assume. The final arbiter is the Supreme Court. What-

¹ Except that Congress might not regulate the places of electing senators.

² Art. III, § 1.

ever that tribunal holds to be constitutional is constitutional and valid, regardless of what other authorities may think and of what consequences may be entailed for both private and public interests. The decision may be by a bare majority of the justices, *i.e.*, five to four. But it is no less the ruling of the supreme authority on that account, and it settles the matter for all time unless the Court later changes its mind. Such a reversal took place in 1871, when the Court, with a somewhat altered membership, sustained as constitutional an act of Congress making paper currency legal tender for private debts, notwithstanding that in the preceding year it had said that this act was unconstitutional. Another change of front occurred in 1895, when the income-tax features of a federal revenue law were held to be unconstitutional, notwithstanding that the income tax of 1862 had been sustained. Such reversals of judgment are, however, infrequent.

CHAP.
XIII

It is unnecessary to say that this function of interpretation gives the courts, and especially the Supreme Court, tremendous power. In exercising it the judges become the authors of a vast amount of case law, which to all intents and purposes forms a part of the constitution. Some writers, it is true, hold that the courts do not make law. But they explain their position in labored language, and it is better to recognize frankly, with Mr. Justice Holmes, that judges "do and must legislate."¹ Furthermore, there is hardly any limit to the constitutional expansion and adaptation that may arise in this way. A controverted phrase of the constitution is interpreted in such a manner as to give it a content and application beyond that formerly attributed to it. This, in turn, furnishes a point of departure for a further elongation when the next case comes up. And so the process goes on, the lines of development, as one writer has put it, being "pricked out by one decision after another until the last has carried matters a long way from the point at which the interpreting process began."²

Judge-made law

The principal question upon which the interpretative activities of the courts have played in the past hundred and thirty years is the powers of the national government; and it will at once supply some measure of the results of these activities to say that the whole body of implied powers of Congress, as distinguished from the modest list of eighteen powers formally enumerated in the eighth

Illustrations

¹ In dissenting opinion in *Southern Pacific Co. v. Jensen*, 244 U. S., 205 (1917).

² W. B. Munro, *Government of the United States* (rev. ed.), 61.

CHAP.
XIII1. Paper
money

section of the first article, is traceable to this source. Two or three illustrations must suffice; many others will be mentioned appropriately in later chapters. The constitution gives Congress power to coin money and regulate the value thereof. In pursuance of this authority, "hard money," or specie, was put in circulation, but for more than half a century no paper. During the Civil War, however, Congress, hard pressed for funds, authorized the issue of bills of credit, or paper money, and undertook to make these notes legal tender; and in 1871 the Supreme Court, as has been stated, ruled that this procedure was constitutional, on the ground that Congress "has power to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage act." Paper money has been legal tender ever since this decision, and for all practical purposes the power to maintain it as such was conferred on the government by judicial decision.

2. National
banks

Again, the constitution gives Congress power to lay and collect taxes and to borrow money. It says nothing about chartering banks. But when the constitutionality of the second United States Bank came before the Supreme Court in the famous case of *McCulloch v. Maryland* in 1819, the decision was that a national bank is a "necessary and proper" means of carrying out the financial powers conferred upon Congress, and hence is constitutional. Thereupon the hitherto uncertain power of Congress to charter banks became a settled part of the governmental system, and along with it the power to put the functions of these banks beyond the taxing power of the states, to confer on the banks the powers of trust companies, and even to establish a "federal reserve" system.

3. Inter-
state com-
merce

To cite one more illustration, the constitution authorizes Congress to regulate commerce "with foreign nations and among the several states." Such regulation, however, could not be carried far before the question would arise, What is commerce? Inevitably, the definition of the term fell to the courts; indeed, the Supreme Court has been progressively defining the word for upwards of a hundred years, and the men who wrote and adopted the commerce clause would be surprised to know how far the definition has now got beyond their simple conceptions. As early as 1824 the Court declared, in the case of *Gibbons v. Ogden*,¹ that "commerce is undoubtedly traffic, but it is something more—it is intercourse;" and, by judicial construction, to regulate interstate

¹ 9 Wheaton, 1.

commerce now means to control not only the transportation of goods by rail and water, but the carriage of passengers, the transmission of light and power, the moving of oil through pipe lines, and even the sending of ideas by telegraph, telephone, and wireless. Changing social and economic conditions and opinions have, furthermore, led the courts, in a series of lottery and pure-food-law cases, to concede to Congress the power to withdraw the privilege of interstate commerce altogether from articles whose transportation is believed to conduce to immorality or to be liable to endanger the public health. In short, the power to regulate has been construed to involve the power to tax, and even to prohibit.¹

CHAP.
XIII

"Time and habit," remarked Washington, "are at least as necessary to fix the true character of governments as of other human institutions;" and so it comes about that another mode by which our national constitution expands and develops is usage or custom. This form of change attracts less attention than the others; it does not—at all events, immediately—result in amendments, laws, or judicial decisions. But all the while the working political system is being silently made over by it. An English scholar, Anson, has written a substantial treatise entitled *Law and Custom of the [English] Constitution*, and another, Dicey, has given us an illuminating exposition of the part which "the conventions" play in English constitutional organization and growth.² As has been pointed out, however, extra-legal understandings, practices, and habits enter largely into the workings of all governments—hardly less, indeed, in America than in England itself—and it is interesting to note that a whole volume dealing with these extra-legal developments in the government of the United States has rather recently come from the pen of an English observer.³ Superimposed upon the instrument of 1787 and its formal amendments, upon the laws that amplify and the decisions that extend it, is a great and steadily developing "unwritten constitution," whose rules and usages determine the actual workings of the governmental system quite as truly as do the stipulations of written law

Growth by
usage

¹ F. J. Goodnow, "Judicial Interpretation of Constitutional Provisions," *Acad. Polit. Sci. Proceedings*, III, No. 2, pp. 1-16 (Jan., 1913). It should be noted that in the discharge of their functions the executive and administrative officers also, from the president down, construe constitutional provisions and thereby aid in giving them new and broader bearings. Such rulings, when tested before the courts, are not always upheld. But many of them work permanent changes in the actual governmental system.

² *Introduction to the Study of the Law of the Constitution* (8th ed., 1915).

³ H. W. Horwill, *The Usages of the American Constitution* (London, 1925).

CHAP.
XIII
Illustrations:

1. The
Presidency

—in fact, sometimes more truly, considering that certain usages have as their object the modification or evasion of the written law. Illustrations come readily to mind. The constitution tells us that the president and vice-president are chosen by electors designated by the people, in accordance with a plan which we know to have been specially drawn to avoid direct popular election. Yet every schoolboy is aware that the electors really make no choice at all—that they merely register the will of the electorates which they represent—and that, therefore, except in meaningless form, the system is the reverse of that which the fathers intended. The unwritten constitution requires the electors to cast their ballots for the candidates of the party which “carried” their respective states. To do otherwise would be a breach of trust. Similarly, the tradition—which amounts almost to a rule—limiting a president to two terms has no basis in the letter of the constitution and runs counter to the intention of at least some of the framers. The cabinet, also, is unknown to the written fundamental law.

2. Con-
gressional
procedure

Congress no less strikingly shows the effect of established usage. The caucus system rests entirely upon this basis. The same is true of the committee system. The speakership of the lower house is, indeed, provided for in the constitution; but the great powers which the speakers gathered to themselves, and which have to some extent survived the reforms of 1910-11,¹ are the product of usage. Notwithstanding the plain stipulation of the constitution that all bills for “raising revenue” shall originate in the House of Representatives, many such measures in effect start in the Senate.² On the other hand, the constitution does not say where appropriation bills shall originate, but as a matter of practice all of them originate in the lower house. It is custom alone that prescribes that members of the House of Representatives shall be residents of the districts which they represent.

3. Political
parties

Perhaps the most striking illustration of all is the development of party machinery. The makers of the constitution did not foresee the rise of permanent political parties of the sort with which we are familiar. Hence the instrument is silent on the subject, and until comparatively late the statutes similarly ignored it. Nevertheless, parties quickly made their appearance, with the result that a vast mechanism—caucuses, conventions, committees, platforms, funds—grew up alongside the machinery of government provided for in the constitution, not only supplementing and enlarging it,

¹ See p. 380.

² See p. 414.

but, as in the case of the election of the president, actually twisting it from its original character and design. Party activities are now regulated to some extent by statute, both national and state. But the very existence of parties continues unknown to the national constitution except as it is assumed in the Twelfth Amendment.

CHAP.
XIII

The foregoing illustrations suggest a certain number of the significant changes which formal amendment, legislation, judicial interpretation, and usage have made in our working governmental system—in our *constitution*, in the broader sense of the term. Many others will be brought to light in succeeding chapters. It is therefore unnecessary, in closing this account of the modes of constitutional development, to do more than enumerate a half-dozen fundamental lines of growth which the student will do well to bear in mind as he proceeds. They are as follows:

1. The bare outline of a governmental system contained in the written constitution as it came from the hands of the fathers has been amplified and filled in, until it has become one of the most elaborate and complicated plans of political organization and procedure known to history.

Larger
phases of
constitu-
tional de-
velopment

2. Notwithstanding the rule laid down in the Tenth Amendment on the reservation of powers to the states, the national government has become far stronger than a reading of the written constitution would indicate and than was intended by a majority of the men who made that instrument.¹

3. While the underlying principle of separation of powers has been adhered to, the executive has developed unexpected influence and importance. It is, indeed, the only one of the three branches which has, on the whole, grown in power at the expense of the other two.

4. The settlement of conflicts of jurisdiction between the nation and the states, unprovided for in the written constitution except in so far as general principles on the subject are laid down, has become a major function of that branch of the national government whose detachment from political strife best fits it for the task, *i.e.*, the judiciary.

5. The popular basis of government—national, state, and local—has been notably broadened, not only through changes of machinery, such as the expansion of the suffrage and the establish-

¹ This is a subject of special comment in Chap. XXIX.

ment of direct election of senators, but through the growth of a more lively and articulate public opinion.

6. In political parties and party organizations, a great mass of machinery, subsidiary to the formal governmental system and long unknown to it, has been brought into being, with a view to organizing the voters, electing men to office, and transmuting principles and programs into actual governmental policy.

REFERENCES

- J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), Chaps. XXXI-XXXV.
- C. K. Burdick, *The Law of the American Constitution* (New York, 1922), Chap. III.
- W. W. Willoughby, *Constitutional Law of the United States* (New York, 1910), I, Chap. XXXVI.
- J. D. Thompson, "The Amendment of the Federal Constitution," *Acad. Polit. Sci. Proceedings*, III, 17-29 (Jan., 1913).
- H. V. Ames, "The Proposed Amendments to the Constitution of the United States during the First Century of its History," *Annual Report of Amer. Hist. Assoc. for 1896*, II.
- , "The Amending Provision of the Federal Constitution in Practice," *Proceedings of American Philosophical Society*, LXIII, No. 1, (1924).
- W. F. Dodd, "Amending the Federal Constitution," *Yale Law Jour.*, XXX, 321-354 (Feb., 1921).
- S. R. Childs, "Revolutionary Amendments to the Constitution," *Const. Rev.*, X, 27-35 (Jan., 1926).
- J. Tanger, "Amending Procedure of the Federal Constitution," *Amer. Polit. Sci. Rev.*, X, 689-699 (Nov., 1916).
- H. E. Flack, "The Adoption of the Fourteenth Amendment," *Johns Hopkins Studies in Hist. and Polit. Sci.*, Extra Vol. XXVI (Baltimore, 1908).
- J. M. Mathews, "Legislative and Judicial History of the Fifteenth Amendment," *ibid.*, XXVII, Nos. 6-7 (Baltimore, 1909).
- C. G. Tiedeman, *The Unwritten Constitution of the United States* (New York, 1890).
- H. W. Horwill, *The Usages of the American Constitution* (London, 1925).
- C. W. Pierson, *Our Changing Constitution* (Garden City, 1922).
- C. A. Beard, *The Supreme Court and the Constitution* (New York, 1912).
- H. L. West, *Federal Power: its Growth and Necessity* (New York, 1918).
- W. MacDonald, *A New Constitution for a New America* (New York, 1921).
- J. M. Beck, *The Constitution of the United States* (New York, 1922).
- The Constitution of the United States of America as Amended to December 1, 1924* (68th Cong., 1st Sess., Sen. Doc. No. 154), 539-758. Elaborate annotation of the nineteen amendments.

PART III. THE NATIONAL GOVERNMENT

1. STRUCTURE, FUNCTIONS, AND WORKINGS

CHAPTER XIV

THE PRESIDENCY

In the first six chapters of this book we took a bird's-eye view of forms, functions, and principles of government as developed in past ages throughout the world in general. In the next three chapters, we noted how our American state and national governments were brought into existence. In the next four, we studied the fundamental features of our present political system, with a view especially to the relation of nation and states, the legal position occupied by the individual citizen, and the modes by which the actual working system of government, and even the formal written constitution, adapts itself to changing ideas and needs. With background thus established, we now come to a study of the governments, one by one, which form parts of the general scheme. First the national government will be described; then the state governments; and finally the local governments, urban and rural, which, although legally subordinate to the state governments, have, nevertheless, a separate organization and a varying, but usually large, amount of actual independence. The chapters contained in the present portion of the book are devoted to the national, or "federal," government, whose outstanding characteristic at once suggests a natural order of treatment. This characteristic is the separation of executive, legislative, and judicial powers, coupled with arrangements for the exercise of each set of powers by distinct, and largely independent, authorities.¹ Our purpose will be best served by taking up, in order, the three great branches of the government which result from this division—first, the executive (considered broadly to include the president, the executive depart-

Plan
of the
remainder
of this
book

¹See p. 52. It would involve unnecessary repetition to enter upon an explanation of this separation here, or of the numerous "checks and balances" that go along with it. But the reader should have these features prominently in mind as he proceeds through the next dozen chapters.

ments, and the general mechanism of administration), then the legislature, *i.e.*, Congress, and finally, and more briefly, the judiciary. We begin with the chief executive, *i.e.*, the president.

The authors of the Articles of Confederation had in mind an extremely simple national governmental system, with powers of such modest proportions that no executive, outside of Congress and its committees, would be needed. Experience soon showed, however, that a separate chief executive was no less desirable in the national government than in the state governments, and when the Philadelphia convention set to work to reconstruct the federal system the principal plans presented for consideration, although differing widely in other respects, agreed in providing for a distinct executive branch. But what should be the form and status of the executive? Here arose many troublesome questions. Should supreme executive power be entrusted to a single official, or should it be vested in a board or commission? How should the executive be chosen? What should be the term, and should more than one term be permitted? In case a single executive was provided for, should a council be associated with him, on the analogy of the governor's council in the states? Above all, what should be the executive's powers, and what relations should the executive have with other parts of the governmental system? No questions that came before the convention roused greater differences of opinion than some of these. On twenty-one different days the general subject of the executive was under discussion; on the method of election alone, more than thirty distinct votes were taken.¹

A decision in favor of a single, rather than a plural, executive was reached with no great difficulty. Most foreign precedents pointed in this direction, and every one of the American states had a single executive, *i.e.*, a governor or "president;" the plan offered all the advantages of unity, vigor, and concentration of responsibility; while fear of executive tyranny and of monarchical tendencies was allayed by prescribing a fixed term, defining powers, and providing for removal by impeachment. If the executive had been made, as some members desired, nothing more than an agency to carry into effect the will of the legislature, the plural form would probably have been adopted; and this might have led to a parliamentary, or cabinet, type of government, on the English pat-

¹ M. Farrand, "Compromises of the Constitution," *Amer. Hist. Rev.*, IX, 486 (Apr., 1904), and *The Framing of the Constitution*, Chap. XI.

tern.¹ But after it was decided that the executive should be a coördinate branch of the government, drawing its authority independently from the people and charged with many duties besides the enforcement of the acts of Congress, it was both natural and wise to gather power and responsibility into the hands of a single man. The national executive of the Swiss republic is plural, and it has proved satisfactory. But it is of the subordinate, rather than the coördinate, type; though not such in form, it is, to all intents and purposes, only an executive committee of the federal legislature.²

CHAP.
XIV

Several members of the convention were willing that the president should hold office during good behavior, and Hamilton expressed a preference for life tenure, subject to removal by impeachment. The prevailing sentiment, however, favored a fixed term, and the question narrowed down to a seven-year term without the privilege of re-election or a four-year term with no restriction in the latter respect. At one stage of the discussion the seven-year plan was adopted. But when it became clear that the president was not to be chosen by Congress, the main objection to re-eligibility was removed; and the four-year term was substituted, with no restriction on the number of times that a man might be chosen to the office.

Term and
re-elig-
ibility

In the course of time a tradition arose which, as every one is aware, has long practically limited a president to two terms. Washington's advanced age and dislike of party strife led him to refuse to be a candidate for a third term. Jefferson could doubtless have been elected a third time, but he also declined. Jackson's popularity would probably have ensured him a third election; but he publicly endorsed the decision of his predecessors and threw his support to another candidate. General Grant, in 1880, was induced to break with precedent by seeking a nomination for a third, although non-consecutive, term. But the public disapproved, and the effort failed. In 1912 Theodore Roosevelt also sought a third term, after being out of office for four years. President Taft received the regular party nomination; whereupon the Roosevelt following organized a new party, nominated their leader, and launched a campaign which won many more votes than the regular Republican candidate secured. The third-term aspirant was, however, not

Precedents -
against
a third
term¹ See p. 52.² R. C. Brooks, *Government and Politics of Switzerland* (Yonkers, 1918), Chap. v.

elected; and while there is nothing to prevent similar attempts in the future, the episode undoubtedly strengthened the popular conviction that two terms for a president are enough. President Coolidge's announced decision in 1927 not to run for re-election in 1928 did not keep a large amount of third-term talk from being indulged in as campaign time approached; and, wisely or unwisely, the Senate was induced by a skeptical opposition group to adopt a resolution declaring against any departure from the no-third-term principle. This pronouncement was, of course, a mere expression of opinion, wholly devoid of legal effect. Naturally the point was made on the other side that even if Mr. Coolidge should be renominated (as he undoubtedly could have been) and re-elected, he would have had only two full, elective terms in office.¹

Proposal
for a
six-year
term

Some people, indeed, believe that it would be better if the president were not eligible to even a second term. Being eligible, he can hardly escape temptation to shape his course, especially in making appointments and wielding the veto power, with a view to re-election; and in so far as he yields, the country's interests are likely to suffer. President Wilson was elected in 1912 on a platform which advocated a constitutional amendment making the chief executive ineligible for re-election;² and in 1913 the Senate, by a vote of 47 to 23, adopted a resolution in favor of an amendment lengthening the presidential term to six years and forbidding any person who had held the office by election or under operation of the law of succession to hold it again "by election." Though favorably reported by the judiciary committee, this proposal did not come to a vote in the House of Representatives, and its revival in the next Congress was similarly barren of result. After the excitement attending the election of 1912 died down, popular interest in the subject subsided. The fact, however, that some sixty

¹ The resolution, adopted on February 10, 1928, by a vote of 56 to 26, read as follows: "Resolved that it is the sense of the Senate that the precedent established by Washington and other presidents of the United States in retiring from the presidential office after their second term has become, by universal concurrence, a part of our republican system of government, and that any departure from this time-honored custom would be unwise, unpatriotic, and fraught with peril to our free institutions." Cf. J. B. McMaster, "The Tradition Against the Third Term," *Atlantic Monthly*, CXL, 374-381 (Sept., 1927); W. B. Munro and W. Lippman, "Shall We Break the Third Term Tradition?" *Forum*, LXVIII, 162-172 (Aug., 1927).

² The candidate did not himself endorse this plank. On the contrary, in a letter written early in 1913 (though not made public until 1916) he declared that a "fixed constitutional limitation to a single term of office" would be "highly arbitrary and unsatisfactory from every point of view." *Amer. Year Book* (1916), No. 34.

resolutions in all had been introduced in Congress, at one time or another, declaring for a single six-year term, created a presumption that the question would come up again, and it was indirectly involved in proposals before the Senate in 1924 for eliminating "short sessions" of Congress and bringing the houses into session in January after elections.¹ We have, too, the opinion of at least one former president that the change ought to be made.²

CHAP.
XIV

The constitution authorizes presidential elections only at regular four-year intervals—not, as in the French republic, whenever a vacancy arises.³ Accordingly, arrangements must be made for filling out a term in case the president dies, resigns, or is removed by impeachment; and the constitution itself provides for a vice-president, who is to take up the duties of president whenever the office falls vacant or the president is himself unable to discharge them. No president has resigned; none has been removed, although the impeachment proceedings against Andrew Johnson failed by a single vote; and no president has been incapacitated to such an extent or for so long a period as to lead to an assumption of presidential functions by the vice-president, although such a transfer of authority was much discussed after the wounding of President Garfield by an assassin's bullet in 1881, and also during the earlier stages of President Wilson's illness in 1919-20.⁴ Six presidents, however, have died in office, and six vice-presidents have in consequence become president.

The vice-
presidency

The vice-president is elected at the same time and in the same way as the president. Unless an emergency makes it necessary for him to assume the powers and duties of president, he has no constitutional function except to preside over the Senate; even there he is not a member and has no vote except in the case of a tie. He is, in reality, an executive officer, with, however, only potential, rather than actual, powers and functions. But he may at any moment be called upon to take the helm of the government, and it goes without saying that he will do well to keep informed on the

The vice-
president's
share in
the work
of gov-
ernment

¹ See p. 357. The single-term resolution was defeated by a vote of 45 to 10; but the question was not considered independently on its merits.

² W. H. Taft, *Our Chief Magistrate and his Powers*, 4.

³ F. A. Ogg, *Governments of Europe* (rev. ed.), 390.

⁴ J. Kerney, "Government by Proxy," *Century Mag.*, CXI, 481-486 (Feb., 1926). No definition of presidential inability is laid down in the constitution or the laws, and there is no specification of who is to decide when the president's disablement is so serious and prolonged that an acting president is necessary. A joint resolution introduced by Senator Fess in 1923 embodied a constitutional amendment under which such decisions should be made by the Supreme Court, at the request of Congress; but the proposal failed.

state of public affairs and on the policies and plans of the Administration. An obvious means to this end would be attendance upon cabinet meetings. John Adams, when vice-president, was present at one or two such meetings, but the practice did not establish itself in the early days, and when President Taylor proposed to invite Vice-President Fillmore to sit as an ex-officio member of the cabinet, he was advised—quite wrongly—that such an arrangement was not possible. In 1908 Mr. Bryan promised that, if elected, the vice-presidential candidate, Mr. Kern, would sit in the cabinet; and Vice-President Marshall presided over a number of cabinet meetings during President Wilson's absence in Europe in 1918-19.

President Harding, in 1921, became the first president to invite the vice-president to sit with the cabinet regularly; and for two years or more Vice-President Coolidge attended meetings, sitting, however, at the foot of the table in the capacity of a supernumerary and rarely taking part in the discussions. It was commonly supposed that this practice would be continued, and after the election of 1924 the president gave the vice-president-elect, Mr. Dawes, to understand that he would be welcome at cabinet sessions. Mr. Dawes, however, indicated that he preferred not to attend; and the president—who, on the basis of his own experience, had no very strong attachment to the plan—did not insist. There was some regret at this abandonment of the Harding policy, because in so far as a seat in the cabinet tended to increase respect for the vice-presidency as an office, it served a useful purpose. Political parties have been much too prone to make use of the position to placate a faction defeated in the contest for the presidential nomination, or to bring on the ticket a representative of a given element or geographical section, or to serve other purposes dictated by party expediency rather than by the thought that the person selected stands a good chance of being called upon to fill the highest office in the land. The plan, however, while excellent in theory, did not work out very satisfactorily, and it seems unlikely to be revived.¹

If occasion arises, the duties of the presidency devolve upon the

¹C. O. Paullin, "The Vice-President and the Cabinet," *Amer. Hist. Rev.*, XXIX, 496-500 (Apr., 1924). With a view to giving the vice-president something really important to do and thereby making the office more attractive to men of first-rate ability, it has been proposed that he be made director of the budget (see p. 504), or even head of one of the ten executive departments. But tradition is opposed, and there are some practical objections besides.

vice-president. But, obviously, there is no guarantee that at any given moment there will be a vice-president; this official may himself have died, resigned, been removed, or become incapable of attending to public business. Moreover, after a vice-president has assumed the presidency, there would be no one—unless further arrangements were made—to step into his place, should necessity arise. Accordingly, the constitution empowers Congress to “provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officers shall then act as president.”¹ The first legislation on the subject passed in 1792, provided that the president *pro tempore* of the Senate should succeed, or in case no such official should be available, the speaker of the House of Representatives. For several reasons this plan was unsatisfactory. Under its operation, the presidency would devolve upon a person who had been sent to the national capital to be, not an executive, but a legislator. It might also bring the government under the direction of a chief executive belonging to a different party from that to which the president and vice-president had belonged. Still more serious, if both the president and vice-president should die during the interim between the expiration of one Congress and the meeting of the next, there might be no president of the Senate and there certainly would be no speaker of the House. The country went along under this system for almost a hundred years. The death of President Garfield in 1881, some weeks before a newly elected Congress was organized, brought home to the public mind, however, the weakness of the existing law, and in 1886 a presidential succession act was passed withdrawing the officers of the legislative houses from the succession and providing that, after the vice-president, the heads of the executive departments should succeed, in the order of the establishment of the departments, *i.e.*, the secretary of state, the secretary of the treasury, the secretary of war,² etc., with due regard for the constitutional qualifications of age, citizenship, and residence. Never as yet, however, has the succession actually passed beyond the vice-president.³

CHAP.
XIVSuccession
to the
presidency

DEFECTS

¹ Art. II, § 1, cl. 6.² So the act of 1886 states, and, therefore, such is the legal order of succession. In point of fact, the next department created after the Department of State was not the Department of the Treasury, but the Department of War, and the succession act is thus curiously in error.³ By inadvertence, no provision was made for the situation that would arise if both the president-elect and the vice-president-elect should die or become incapacitated after the electoral colleges have adjourned, but before the

CHAP.

XIV

Qualifica-
tions

Three absolute qualifications for the presidency are prescribed by the constitution. The president must be at least thirty-five years of age; he must have been a resident of the United States for at least fourteen years; and he must be a "natural-born" citizen. In order not to exclude foreign-born citizens who had helped bring the new government into being, *e.g.*, Alexander Hamilton and James Wilson, all citizens of the United States at the time of the adoption of the constitution were exempted from the last-mentioned requirement. But with the passing of the generation which saw the new frame of government adopted, the rule debarring the foreign-born came automatically into complete operation. Inasmuch as the vice-president may at any time be called upon to take up the duties of the presidency, he must, of course, have all of the qualifications required for that office.

Salary and
allowances

By constitutional provision, the president receives a salary, whose amount can be neither increased nor diminished during the period for which he has been elected. He is forbidden to receive any other emolument, either from the United States or from any state. But this is construed not to prevent the United States from furnishing him a mansion (the White House), a suite of executive offices, and special allowances for vehicles, furniture, repairs, clerk-hire, and travel, amounting to about three hundred thousand dollars annually. Originally fixed at \$25,000 a year, the president's salary was raised in 1871 to \$50,000, and in 1909 to \$75,000. The vice-president receives \$15,000.

Immunities

From the president's position as head of the executive branch, it follows that his person is inviolable. He cannot be arrested for any offense, not even murder; no court has any jurisdiction over him; he cannot be in any way restrained of his liberty. Only by impeachment can he be removed from office; and only after removal does he become amenable to judicial process. Even while impeachment proceedings are in progress, he cannot be arrested, or forced to appear before the tribunal (*i.e.*, the Senate) hearing the case, or to give testimony, or to give up any of his powers as president.

As early as 1781, when the first executive departments were

fourth of March, or, again, for the contingency of failure to elect either a president or a vice-president by reason of (a) lack of a majority of electoral votes for any candidate, (b) lack of a majority in the House of Representatives (voting by states) for any presidential candidate, and (c) deadlock in the Senate preventing the election of a vice-president. On this deficiency see, further, p. 230 below.

created by the expiring Continental Congress, it was suggested that their principal officers should consult together as an advisory council, and in the convention of 1787 several plans for a council—a council of appointment, a council of revision, or a general advisory council—were considered. No proposal on the subject, however, was adopted, and it remained for a definite, recognized, official advisory group to form around the president, not in response to constitutional or statutory stipulations, but as a mere matter of convenience and usage. To this day, the “cabinet”—composed of the heads of the ten executive departments, *i.e.*, State, War, Treasury, Justice, etc.—although an exceedingly important part of our governmental mechanism, is, as such, known only incidentally to the law.¹ Differing widely from the English cabinet in its actual position and powers, it is at least like that remarkable institution in being a product of spontaneous historical development.

CHAP.
XIVQuestion
of an
executive
council

From the beginning of his administration, Washington, in addition to calling on the heads of departments for written opinions, as authorized in the constitution, orally consulted various principal officers, including the department heads, and in 1791 meetings began to be held which closely resembled the cabinet meetings of later days. In 1793 the disturbed international situation caused these consultations to become more frequent, and the cabinet—the name also came into use at this time—began to take on the aspect of a recognized and accepted institution. Some people shook their heads and predicted that from the “cabinet conclave,” unknown to the constitution, would flow all manner of abuses. But, under the existing circumstances, the development was inevitable. In common with other public men of the day, Washington originally supposed that the Senate would serve substantially as an executive council. But when he appeared on the floor of that house to consult about certain Indian treaties, the demeanor of the members clearly showed that they did not take this view of their functions, and the expected relationship did not develop. Furthermore, contrary to practice in England and in the colonies, the courts, in 1793, assumed the position that they would not give opinions, even to the president, except in the decision of actual cases; hence the need of consultation could not be met in that direction. Finally, the House of Representatives discouraged,

How the
cabinet
arose

¹On the way in which the term “cabinet” was first brought into the statute law, see H. B. Learned, *The President's Cabinet*, 157-158.

and practically prevented, heads of departments from appearing in person before it in order to submit reports and give explanations. The effect of all of these things was to force the president and heads of departments into a more isolated position, and to compel them to rely upon one another for opinions and advice to an extent previously quite unexpected.¹

Originating thus almost at once after the government under the constitution was set going, the cabinet has had a continuous, and on the whole an honorable, history to the present day. It remains, however, what it was at the outset—a purely advisory body. The president can make much use of it, or little, or none at all, as he chooses. Looking upon the heads of departments as clerical officers, and preferring the advice of his personal friends, official and otherwise, Jackson early discontinued cabinet meetings altogether;² and some other presidents, *e.g.*, Grant, have leaned but lightly on their cabinet advisers. On the other hand, certain presidents, *e.g.*, Pierce, have consulted their cabinets at every turn and have usually followed the advice received. An able cabinet can go far to make up for the deficiencies of a weak president, and can give much added strength to a strong one.

Nowadays the cabinet meets ordinarily twice a week, except during vacation periods. Such subjects are discussed as the president brings up, or as—usually with the president's assent given in advance—are brought up by one of the department heads. Naturally, time is given chiefly to questions involving the general policy of the Administration, such as the attitude to be taken toward Mexico, or toward a tax reduction bill, or toward an increase of the army. But there are no limits except those of time and interest, and in practice the discussions range very freely and broadly over the government's work and policy. Proceedings are extremely informal. There are no rules of debate; free interchange of opinion takes place on a conversational basis; only rarely is there a vote; no minutes or other official records are kept. Furthermore, such decisions as are reached are mere recommendations. Just as the president is free to submit or not submit a subject for consideration, so is he free to make any final disposal of the matter that he likes. Ordinarily, he will be influenced by the opinion of the men whom he has specially selected as his advisers.

¹ The beginnings of the cabinet are fully described in Learned, *op. cit.*, Chap. v.

² W. MacDonald, *Jacksonian Democracy*, 50-51.

But if he thinks that their advice is not sound he is under no compulsion to follow it. It is he, not they, who will have to bear responsibility before the country for whatever is done. "Seven nays, one aye—the ayes have it," announced Lincoln, following a cabinet consultation in which he found every member against him. Cabinet discussions bring out useful information and opinion, clarify views, and develop morale in the Administration. They help the president choose his course on pending and proposed legislation. But they do not culminate in decisions of policy by mere show of hands.¹

CHAP.
XIV

REFERENCES

The Federalist, Nos. LXIX-LXXII.

G. Hunt [ed.], *The Writings of Madison* (New York, 1900-10), III-IV, for Madison's "Notes."

A. C. McLaughlin, *The Confederation and the Constitution* (New York, 1905), Chap. xvi.

J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chap. v.

H. W. Horwill, *The Usages of the American Constitution* (London, 1925), Chaps. III-V.

F. J. Goodnow, *Principles of Constitutional Government* (New York, 1916), Chap. xi.

J. A. Woodburn, *The American Republic and its Government* (New York, 1908), Chap. III.

J. W. Perrin, "Presidential Tenure and Re-eligibility," *Polit. Sci. Quar.*, XXIX, 423-437 (Sept., 1914).

C. C. Thach, "The Creation of the Presidency, 1775-1789," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, Ser. XL, No. 4 (Baltimore, 1922).

S. Herbert, "The Premiership and the Presidency," *Economica*, VI, 159-169 (June, 1926).

H. B. Learned, "Some Aspects of the Vice-Presidency," *Amer. Polit. Sci. Rev.*, Supplement, VII, 162-177 (Feb., 1913).

A. J. Beveridge, "The Vice-President; the Fifth Wheel in Our Government," *Century Mag.* LXXIX, 208-214 (Dec., 1909).

O. P. Field, "The Vice-Presidency of the United States," *Amer. Law. Rev.*, LVI, 365-400 (May-June, 1922).

H. B. Learned, *The President's Cabinet* (New Haven, 1912).

M. L. Hinsdale, *History of the President's Cabinet* (Ann Arbor, 1911).

J. A. Fairlie, "The President's Cabinet," *Amer. Polit. Sci. Rev.*, VII, 28-44 (Feb., 1913).

¹The relations of the president and heads of departments will be further brought into view in chapters dealing with presidential powers and functions (xvi-xvii) and the organization and workings of the administrative system (xviii-xx). On the relations of the cabinet members and Congress see pp. 274-277. The salary of heads of departments was raised in February, 1925, from \$12,000 to \$15,000.

CHAPTER XV

NOMINATION AND ELECTION OF THE PRESIDENT

Direct popular election rejected by the framers of the constitution

After the Philadelphia convention completed its labors, James Wilson, delegate from Pennsylvania, declared that the most difficult question that the makers of the constitution had faced was the method of electing the president; and the opinion is borne out by the fact that, as has been indicated, more than thirty distinct votes were taken on that subject. Three main plans were considered. One was direct election by the people. Gouverneur Morris and a few other delegates warmly advocated this method, but it won small support, because most members believed that the voters, scattered thinly over what already seemed a large country, would be unable to inform themselves on the qualifications of candidates. The delegates of the small states, furthermore, thought that the large states would enjoy too great an advantage. Besides, it was feared that direct popular election would result in the triumph of demagogues, which might, in turn, lead to the establishment of monarchy.

Decision in favor of an electoral college

Election by Congress found warm support, especially from members who conceived of the president as merely an officer to execute the laws; and this plan was twice adopted, on one occasion unanimously. Opinion, however, gradually came to favor a balance of power between Congress and the president such as could hardly exist if the latter were chosen by the former; and in the end the convention gave its decision in favor of a proposal for election by the people, not directly, but through the medium of an electoral college. This plan, suggested by Hamilton, seems to have been borrowed from Maryland, where, under the constitution of 1776, members of the upper branch of the legislature were selected by a body of electors chosen by the people every five years. At all events, it seemed a happy solution; the method of electing the president became, indeed, one of the few features of the new frame of government that did not have to be defended.

The system agreed upon was, in brief, as follows: (1) each state was given presidential electors in number equal to its quota

of senators and representatives in Congress; (2) these electors were to be chosen in each state in such manner as the legislature should direct; (3) at the prescribed time, the electors in each state should assemble and each should cast a ballot for two persons, of whom at least one should be a resident of a different state; (4) the result of this vote in each state should be certified to the president of the Senate, who, in the presence of the Senate and House of Representatives, should open the certificates; (5) an official count having been made, the person obtaining the greatest number of votes, if a majority, should be declared president, and the person obtaining the next greatest number, if a majority, should be declared vice-president; (6) a tie for the presidency should be decided by the House of Representatives, voting by states (each state delegation having one vote), and for the vice-presidency, by the Senate; (7) if no person received a majority of the total electoral vote, the House, again voting by states, should choose from the five highest on the list.¹ It was expected that the electors would usually be the most capable, far-seeing, and trustworthy men in their respective states, and the merit of the plan was considered to lie chiefly in the independent and expert judgment which they would exercise in choosing the nation's highest executive officers. Every elector was to be a free agent, charged only with making up his mind upon the qualifications of the available men and casting his votes accordingly.

CHAP.
XV

The system
originally
adopted

For a short time the scheme worked as its authors intended. In 1789, and again in 1792, every elector, indeed, wrote the name of Washington on his ballot. But the second votes were scattered, according to individual preference, among eleven men in the first election and four in the second. In 1796 thirteen men received votes, indicating as yet a good degree of independence on the part of the electors. But in 1800 every elector except one wrote on his ballot the names of either Jefferson and Burr or Adams and Pinckney. The reason was that by this time two distinct political parties had come into the field, and each had taken steps in advance of the popular election to designate its "candidates" for the presidency and vice-presidency, and also to put before the voters of the several states lists of men who, it was understood, would, if chosen by the people, cast their electoral ballots exclusively for the recognized candidates of the party to which the given electors belonged.

Changes
arising
from
practice

¹ Art. II, § 1.

The effect was, of course, to defeat the one purpose for which the electoral college existed. Instead of exercising independent judgment, presumably based on superior knowledge, the electors now became merely a body to register, in a formal and perfunctory way, the will of the voters who had chosen them. The rise of political parties, entirely unforeseen by the constitution's makers, had wrought a silent revolution in the governmental system within a decade; without the change of a letter in the fundamental law, indirect popular election had become, to all intents and purposes, direct election. The electoral college still forms part of our political machinery.¹ But it has survived only because most persons consider that it does little harm—in other words, because it interposes no effective obstacle to the one thing which it was intended to prevent, *i.e.*, the actual choice of the president and vice-president by the people.

The presidential
contest
of 1800

A way was open for this remarkable transformation without changing a word of the constitution. The rise of parties united in support of given candidates brought to light, however, a defect which could be remedied only by a formal amendment. The electors were to vote for "two persons," without indicating which was favored for president and which was supported for vice-president. Accordingly when, in 1800, the Republicans gave their electoral votes exclusively to Jefferson and Burr, a tie resulted—as, indeed, must have been the case every time the electors of the victorious party concentrated their votes unanimously upon the same candidates. Yet this was precisely what the voters, even by 1800, expected the electors to do. The desire, both of the people and of the electors, in the present situation was that Jefferson should be president; very few wanted to see Burr in the office. Yet, on account of the tie, the House of Representatives must decide between the two men, and there was no guarantee that the choice would conform to the Republicans' intention, especially in view of the fact that the votes (one for each state) would in several instances be cast by men of the opposite political faith. Only with great difficulty, indeed, were the Federalists restrained from taking vengeance on their opponents by swinging the election to Burr.

The
Twelfth
Amendment

Jefferson was chosen. But before another election came around, the Twelfth Amendment, adopted in 1804, changed the system by

¹ As is pointed out below, however, its abolition would raise some rather difficult questions concerning an alternative mode of election (see p. 231), so that to dispense with it would not be as simple a matter as is commonly supposed.

providing that the electors should "name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president." Thereafter, the two offices were dealt with separately, and the major difficulty of 1800 could never reappear, although an election might still be thrown into the House. It remained possible, of course, for the president and vice-president to be members of different parties; and that is still possible. But it is not likely to happen as long as each elector casts both of his votes for the accepted candidates of his own party. The powerful custom which requires the electors to do this can be depended upon to avert an awkward contingency.¹

 CHAP.
XV

The change that has been described was brought about by formal constitutional amendment. The rise of parties resulted, however, in other important alterations which grew out of, and still rest upon, mere practice. One of these is the loss of discretionary power by the electors, already mentioned. Another is the development of machinery for the selection of candidates in advance of the popular vote. The framers of the constitution made no provision for nominations. Under the electoral system which they had in mind, no nominations were required; the voters were to choose electors whose discretion they could trust, and the electors were to cast their ballots for the two men whom they individually considered best equipped for the nation's highest office. As soon, however, as political parties appeared, nominations became a necessity. A prime object of party is to secure control of the offices as a means of carrying the party tenets into effect. To accomplish this, the party members must concentrate their votes on particular candidates, which, of course, they cannot do unless the candidates to be thus favored are somehow agreed upon in advance of the election. Party rivalry, therefore, presupposes some scheme of nominations.

 Rise of
nominating
machinery

The first device hit upon to this end was the caucus. ^{nominating}Caucuses were, indeed, a familiar feature of American politics before 1789. As early as 1763, John Adams commented in his diary on a "caucus club" which met from time to time in the garret of a certain Tom Dawes and chose, *i.e.*, "nominated," selectmen, as-

 The con-
gressional
caucus

¹ Incidentally, the rise of parties and the adoption of the Twelfth Amendment relegated the vice-presidency to a lower position in popular esteem than had been intended for it. Originally, *all* candidates were to be considered, presumably, with reference to their fitness for the presidency. But henceforth vice-presidential candidates became a group apart, whose qualifications were inevitably judged on separate and less exacting lines. In this respect the new system was a change for the worse.

sessors, collectors, and wardens before they were "chosen in the town." Caucuses played an important part in the Revolution, and by 1800 they had become the usual means of choosing candidates in local, state, and national governments. In the national field, the caucus was composed of the party members in Congress. They, of course, had no express authority to pick candidates. But they were in touch with political sentiment in their respective states, and no other agency was clearly available. A Republican caucus is thought to have been held in 1796. At all events, both Republicans and Federalists nominated presidential candidates in this way in 1800 and for two decades thereafter.

As a piece of nominating machinery, the congressional caucus was open to serious objections. It acted by assumed rather than delegated power; it gave little or no voice to the party members in states in which the party was in a minority; and it violated the principle that the president should not owe his election to the legislative branch of the government. Protest against it was heard from the start; and when, in 1824, it assumed to dictate that the people should support William H. Crawford for the presidency, rather than John Quincy Adams, Henry Clay, or Andrew Jackson, the revulsion was so great that its action was ignored, its candidate was badly beaten, and the caucus itself, as an agency of presidential and vice-presidential nominations, was allowed to drop into complete disuse. For a time, no definite substitute appeared. In 1824, and again in 1828, Jackson, Adams, and other favorites were named by state legislatures, state legislative caucuses, and various unofficial popular assemblages; as late as 1842, Calhoun was placed in nomination (for 1844) by the legislatures of two southern states. Already, however, the demand for the popularizing of party machinery had led in many states to the replacing of the caucus with specially chosen party conventions;¹ and in 1831 both the National Republican and Anti-Masonic parties held national meetings of this nature in preparation for the presidential election of the following year. Candidates were nominated and platforms were adopted; and in 1832 the Democrats fell into line with a convention, although, taking Jackson's candidacy for granted and feeling that the record of his administration formed a sufficient platform, they found little to do save to nominate Van Buren for

¹ Occasional state conventions are on record as early as 1792, and in New Jersey the convention system was used regularly after 1810. General adoption of the system in the states came, however, only after 1820.

the vice-presidency. Many political leaders, including such statesmen as Webster and Calhoun, opposed the new device because it gave the rank and file too much voice in party management. Nevertheless, by 1840 the national convention became the regular means of putting both candidates and platforms before the voters; and such it has remained.

CHAP.
XV

To understand the way in which presidential and vice-presidential candidates are nominated nowadays, it is, therefore, necessary to know something about the national convention—how it is called, of whom it is composed, how it is organized, what is its procedure, and what are its merits and defects.

The national conventions of the two major parties, and of at least such minor parties as have built up a permanent organization, are held at the call of the national party committee. The Democrats have had such a committee since 1848 and the Republicans since the first appearance of their party in a presidential campaign in 1856.¹ Prior to the adoption of national woman suffrage in 1920, both Democratic and Republican national committees consisted of one member from each state, territory, dependency, and the District of Columbia. In 1920 the Democrats enlarged their committee so as to contain one man and one woman from each unit represented in the national convention (including the Panama Canal Zone), and in 1924 the Republicans adopted the same plan.² Members of the national committees are elected for four years, by the national convention—with the qualification that where state laws require election in a party primary, or in some other specified manner, such election is regarded as a “nomination” to the national convention, and “election” by that body follows as a matter of course.³ In December or January preceding a presidential election, the national committee meets, usually in Washington, decides upon the place and date of the ensuing convention, and requests the party members and supporters to choose delegates and alternates according to the apportionment contained in the call. The call is officially communicated to the state committees, and is, of course, published widely in the newspapers. The convention

The
nominating
convention

¹ It is hardly necessary to say that the Republican party here referred to is the present-day party of that name, not the Jeffersonian Republican party mentioned above.

² From 1920, however, there was a woman “associate member” of the Republican national committee in about forty states.

³ *Official Report of the Proceedings of the Seventeenth Republican National Convention* (1920), p. 74, Rule XIV; *Official Proceedings of the Democratic Convention of 1920*, pp. 88-95, 173-177.

is commonly set for June or early July of the election year, and the place is chosen, usually from a list of competing cities, with a view to the financial assistance and other facilities promised, sometimes also in the hope of influencing political feeling in a given section of the country.

For some time before 1852, the number of votes allotted to each state in a national convention was usually equal to the number of the state's votes in the electoral college. From 1852 to 1872, the state delegations in the Democratic convention consisted of twice this number, but each delegate had only a half-vote. Since 1872 the number has been determined in the same way, but each delegate has had a whole vote; and this likewise was Republican practice from 1860 until after the convention of 1912, when, as will be explained presently, some reductions began to be made in the delegations sent by the southern states. Four delegates, at least, from each state are delegates-at-large;¹ the remainder are district delegates. Furthermore, by courtesy, the District of Columbia and all territories and dependencies (except the Panama Canal Zone, in the case of the Republican convention) are represented.² The convention is, therefore, a large body; the Republican assemblage of 1928 contained 1,089 delegates, the Democratic gathering contained, 1,100. For every delegate, too, there is an alternate, who, however, takes part only when needed as a substitute.

Notwithstanding the purely party character of the national convention, its membership was formerly apportioned according to total population, and not at all according to party strength. In the case of the Democrats this is still true: the overwhelmingly Democratic states of the "Solid South" are treated exactly like Pennsylvania, Vermont, and other northern states which are carried almost invariably by the Republicans. After all, Democratic strength is, however, distributed fairly generally over the country, and the system works only a moderate amount of injustice. In the Republican convention, on the other hand, the plan formerly produced extraordinary results indeed. One great section, *i.e.*, the "Solid South," yields relatively few Republican popular votes and, with rare exceptions, no Republican electoral votes at all. Yet states of that section formerly sent many more delegates to Republican conventions than certain northern states which unfailingly roll up

¹ If a state happens to have a congressman-at-large (see p. 353), it is entitled to two additional delegates-at-large. For provision made by the Republicans in 1923 for still other delegates-at-large, see p. 216.

² They have, of course, no part in finally electing the president.

substantial Republican majorities; they had great weight in selecting candidates and making platforms, but contributed little or nothing to party victory. Thus, in the convention of 1908, South Carolina had eighteen delegates, Maine had twelve; but the former state mustered only four thousand Republican popular votes in that year, and, of course, no electoral votes, while the latter yielded sixty-seven thousand popular votes and six, *i.e.*, all, her electoral votes. In other words, 220 Republicans in South Carolina had as much voice in nominating Mr. Taft for the presidency as did 5,580 in Maine. In 1912 Georgia, which had cast only 41,692 Republican votes four years previously, had twenty-eight delegates, whereas Iowa, with 275,210 Republican votes in 1908, had only twenty-six; and Alabama, Louisiana, Mississippi, and South Carolina, with a total Republican vote of 42,592, had eighty-two delegates, while "rock-ribbed" Pennsylvania with a Republican vote of 745,779 had only seventy-six.

CHAP.
XV

For many years, protest against these illogical arrangements was fruitless, although scarcely a meeting of the national committee took place at which the subject was not discussed. The desire of the party to build up some real strength in the South, and the fear of alienating negro support in both North and South, stood in the way of action. Even so, a proposal in 1908 to give Republican states greater relative weight narrowly failed, both in the committee and on the floor of the convention. Four years later, the rôle played by the grossly disproportionate southern delegations at Chicago—composed as they were mainly of federal officeholders controlled from the White House—became a conspicuous cause of Republican schism and defeat; and at last the party managers gathered courage to carry through a real, even though modest, change. Under a decision reached in 1913, congressional districts recording fewer than 7,500 Republican votes for president in the preceding year were represented in the convention of 1916 by one delegate instead of two. This had the effect of cutting off seventy-nine members from eleven southern states. With but slight modifications, the same basis of apportionment was used in 1920.

Republican
readjust-
ments since
1913

At the last-mentioned date, it seemed that the readjustment would be carried to further important stages; though the outcome was disappointing and showed how grudging, not to say painful, the process was. The convention of 1920 adopted a resolution directing the national committee to devise "a just and equitable

basis of representation" in future conventions in order "to effect proper and necessary changes in the present apportionment of delegates *in proportion to the Republican vote actually cast at general elections throughout the various states.*"¹ Subsequently, in 1921, the national committee adopted a tentative rule which would have reduced the number of southern delegates in the convention of 1924 by twenty-six; but later, in December, 1923, the committee substituted a plan under which each state might send (a) one district delegate from each congressional district, and an additional delegate from each congressional district casting 10,000 votes for a Republican presidential elector in 1920, or for the Republican nominee for Congress in the last preceding (1922) congressional election, and (b) four delegates-at-large as formerly, with two additional delegates-at-large if the state had a congressman-at-large, and three further delegates-at-large if it was carried by the Republican party in the presidential election of 1920. The net effect of this plan was to give the southern states nine, and the northern and western states 116, more delegates in the convention of 1924 than in that of 1920. Thus it was that the total number was brought up from 984 to 1,109. The new rule marked a wide departure from the mandate of 1920. But it was accepted without a word of protest at the convention of 1924, and was by that body made applicable to the convention of 1928, the number of delegates on the latter occasion to be based on the results of the presidential election of 1924 and the congressional elections of 1926.

Originally, delegates to national conventions were chosen variously by mass-meetings, caucuses, and district and state conventions. But under the leadership of the Ohio Whigs it became customary to elect the delegates-at-large in state conventions and the district delegates in conventions held in the several congressional districts. Until 1912, the Democrats never cared to adopt any nation-wide rule on the subject, and their practice showed much variation. For example, in New York and several other states all of the delegates were formerly chosen in the state convention, although the delegates from each congressional district were nominated by the members of the state convention from that district. As early as 1884, on the other hand, the Republican national committee began to require uniform use of the convention sys-

¹ *Official Report of the Proceedings of the Seventeenth Republican National Convention*, 233.

tem for the choice of delegates-at-large, and in 1888 the rule was adopted that district delegates should be chosen in the same way in which congressmen were nominated, which at that time was practically tantamount to requiring selection by district conventions.

CHAP.
XV

Shortly after 1900, the direct primary began to be used in various states in nominating candidates for state and local offices, and inevitably the question arose of applying the new device to the choice of delegates to the national conventions. This was first done by Oregon in 1910; and so rapidly did the plan take hold that ten states were able to choose their delegates to the 1912 conventions in this way. As a result, the Democratic national convention of 1912 formally accepted the primary, conducted under either state law or party rules, as a valid method of selecting delegates to the national convention in 1916. The Republican convention of 1912 refused to seat certain delegations chosen under direct primary laws, on the ground that these laws were in conflict with the long-established rules of the convention which required the election of delegates by district and state conventions. This position could not, however, in the long run be maintained; and at a special meeting held in December, 1913, the national committee formulated a new rule, which was afterwards adopted, recognizing as valid the credentials of delegates chosen in direct primaries where such primaries were established by state law. By 1916, twenty-two states had mandatory presidential primary legislation; three others had permissive legislation; and more than half of the delegates were chosen under the plan in that year. There were, however, important differences of form, arising principally from the relation established between the election of delegates by the voters belonging to a given party and the signification of popular preference among the presidential aspirants within that party. Thus, whereas New Hampshire and South Dakota provided for the popular election of delegates, they afforded no opportunity for the people to vote directly on presidential candidates; Iowa and Minnesota provided for a popular vote on the presidential aspirants, but without obligating the delegates to be guided by the result; and Oregon and Ohio not only gave the voters a means of indicating their presidential preference, but undertook to bind the delegates to act accordingly. Certain states also, *e.g.*, Vermont, Michigan, and Indiana, without taking the choice of delegates out of the hands of conventions, provided for a prefer-

The presi-
dential
primary:

Origins

ence vote on presidential candidates in connection with the election of delegates to the state convention.

In past years it was repeatedly suggested that the presidential primary, in some one of its numerous forms, be made nation-wide by federal law. Thus, in his first annual message, December 2, 1913, President Wilson urged a plan which would enable the voters of the several parties to nominate directly and would make of the national convention only a gathering of party officers and nominees for the purpose of declaring and accepting the verdict of the primaries and formulating the platform. Numerous bills looking in this direction, and even to the suppression of the national convention altogether, made their appearance. No legislation of the kind, however, has been enacted. In actual operation, the new device revealed serious defects—among others, the enormous cost of making a primary campaign over any considerable part of the country. Furthermore, experience with the direct primary in general, in state as well as national elections, has been somewhat disappointing. Constitutional obstacles to the proposed federal legislation also arose. Consequently, the presidential primary movement, after starting off with apparently irresistible force, lost momentum, and since 1916 no additional states whatever have adopted the system. Indeed, since that date five states have abandoned it—Iowa and Minnesota in 1917, Vermont in 1921, Montana in 1924, and North Carolina in 1927. Furthermore, repeal in North Dakota was prevented in 1927 only by veto of the governor.¹ Those who still believe in the principle very properly point out that it has been tested only through a relatively brief period and under haphazard arrangements which have greatly interfered with its operation, and they urge that, with the aid of uniform nation-wide legislation, the problem both of direct election of delegates and popular expression of presidential preferences can be solved. At the present time, however, the plan certainly has no assured future, and meanwhile the members of our national conventions continue to be chosen, in not very unequal numbers, under the rival primary and convention systems. Except in 1912, the national conventions and their actions have shown little practical effect of the application of the primary principle; and even on that occasion the drift of Republican opinion in favor

Failure to
become
general

¹ At the election of 1928 mandatory presidential primary laws were in operation in seventeen states, choosing, in all, 456 Democratic and 502 Republican delegates. See *Amer. Polit. Sci. Rev.*, XXII, 108 (Feb., 1928).

of Roosevelt, as revealed in the primaries, did not enable that candidate to win in the Chicago convention.¹

CHAP.
XV

Physical
surround-
ings of the
convention

The convention of a major party meets in a great hall, lavishly decorated with flags, bunting, and portraits, and capable of seating usually ten or twelve thousand people. The delegates are accommodated on the main floor, grouped around placards bearing the names of their states; the alternates are seated directly back of them; representatives of the press are given generous space; and the galleries are occupied by the thousands of spectators who are fortunate enough to obtain tickets of admission. "A European," says Lord Bryce, "is astonished to see nine hundred men prepare to transact the two most difficult pieces of business an assembly can undertake, the solemn consideration of their principles, and the selection of the person they wish to place at the head of the nation, in the sight and hearing of twelve thousand other men and women. Observation of what follows does not lessen the astonishment. The convention presents in sharp contrast and frequent alternation the two most striking features of Americans in public—their orderliness and their excitability. Everything is done according to strict rule, with a scrupulous observance of small formalities which European meetings would ignore or despise. . . . Yet the passions that sway the multitude are constantly bursting forth in storms of cheering or hissing at an allusion to a favorite aspirant or an obnoxious name, and five or six speakers often take the floor together, shouting and gesticulating at each other till the chairman obtains a hearing for one of them."² Bands play popular airs; noisy and spectacular "demonstrations" are carried out by supporters of "favorite sons" or other aspirants; cheering is sometimes kept up for as long as an hour, until sheer physical exhaustion silences it. It is only because most of the real work of the convention is done behind the scenes—in committee rooms, in the living quarters of influential delegates, indeed, wherever private conferences can be held and understandings reached—that the body does not become a mere mob, incapable of performing its functions.

The sessions usually extend over three or four days. On the first day the meeting is called to order by the chairman of the na- | Temporary
organiza-
tion

¹ For a full and excellent treatment of the subject see L. Overacker, *The Presidential Primary* (New York, 1926). Cf. F. W. Dickey, "The Presidential Preference Primary," *Amer. Polit. Sci. Rev.*, IX, 467-487 (Aug., 1915), and E. M. Sait, *American Parties and Elections* (New York, 1927), 442-449.

² *American Commonwealth* (4th ed., 1910), II, 193-194.

tional committee, who, after prayer has been offered, and the call for the convention has been read by the secretary of the national committee, announces the list of temporary officers agreed on in advance by that committee. Other nominations may be made, but as a rule the committee's slate is accepted without a contest. The temporary chairman then delivers a speech, prepared before the convention met, in which he eulogizes the party, assails the record of its opponents, urges harmony, and in general sounds the "key-note" of the proceedings. Pending permanent organization, the rules of the convention held four years previously are adopted; and the day's work closes with a roll-call of the states and territories, whose delegations, one by one, announce through their chairmen one of their members to serve on each of the four great committees: (1) credentials; (2) permanent organization; (3) rules and order of business; and (4) resolutions, or platform—although the less wearisome plan is sometimes followed of permitting the chairmen of the several delegations merely to hand in written lists of committee assignments.

The next sessions, extending over at least one day, are devoted to receiving and acting on the reports of these committees. The committee on rules and order of business submits a body of rules based on those of the House of Representatives, together with an order of business which adheres closely to past practice; and its report is usually accepted with little or no discussion. The committee on credentials has the difficult task of awarding contested seats, supposedly on the basis of evidence filed in advance with the national committee. Sometimes, as in the Republican convention of 1912, contests are numerous; and according as they are decided, the scale may be turned for or against control by a given element of the party, or for or against the nomination of a given candidate. Hence, although the list made up and reported by the committee is usually accepted, heated controversy may arise and the committee may be overruled.¹

The next step, normally—although sometimes it is taken before the list of approved delegates is fully made up—is to effect permanent organization. The committee on that subject reports, nominating a list of permanent officials; and usually the persons named are elected without debate. The permanent chairman will have many difficult decisions to make, and he must be both a master

¹ In the interest of harmony, two contesting delegations from a state are sometimes admitted, each member having a half-vote.

of parliamentary law and a man of energy and decision. His first duty, however, is to make a lengthy speech on the issues of the day.

CHAP.
XV

Finally, the committee on resolutions reports. As a rule, some of the leading delegates bring to the convention trial sets of resolutions,¹ and with these in hand, reënforced with no end of suggestions and admonitions from both delegates and outsiders, the committee labors, often through an entire night, to shape up a platform that will meet the convention's approval and please the voters. If possible, a platform is reported unanimously. Occasionally, however, there is a minority report; and in any case the committee's work is closely scrutinized on the floor of the convention, and is likely to be debated at some length, with or without resulting changes. The platform deals with a great variety of subjects, often including matters with which, in point of fact, the government has little or nothing to do. It is likely, also, to abound in generalities, with much appeal to party loyalty and to other sentiment. Its main object is, indeed, not to lay out a definite program to be followed by the party if it is entrusted with power, but rather to gratify the faithful with a reiteration of time-honored principles, to placate differing wings and factions, and to persuade sundry particular groups that the party is their friend.

Framing
the
platform

This brings the convention, by the third or fourth day, to its main objective, *i.e.*, the nomination of candidates. The secretary calls the roll of states, beginning with Alabama, and each delegation, in its turn, has an opportunity to place a candidate in nomination. If the delegates of a state which stands near the top of the list choose to do so, they may yield to a delegation which otherwise would have no chance to make a nomination until later; and this may give a distinct advantage to the candidate of the state thus favored. As a rule, two or three eulogistic speeches are made in behalf of each candidate,² and all possible effort is put forth by the orators and by the delegates and spectators supporting a given candidate to rouse enthusiasm for him. Noisy demon-

Nomina-
tion of
candidates

¹In 1920 the Republicans set up, in advance of their convention, a committee of inquiry composed of well-known members of the party and charged with the duty of canvassing public opinion on questions likely to call for treatment in the platform. A list of topics was made out, sub-committees were appointed, and questionnaires were sent to large numbers of people. The tabulated results were placed at the disposal of the platform makers.

²Convention oratory tends to emotionalism and extravagance, although sometimes—as in the case of Ingersoll's "Plumed Knight" apostrophe, placing Blaine in nomination at Cincinnati in 1876—it rises to the level of real eloquence.

strations, sometimes spontaneous, but usually carefully pre-arranged, interrupt the proceedings for periods up to, and even exceeding, an hour. As many as ten or a dozen candidates may be nominated, but as a rule the number does not exceed five or six.

When all the nominations have been made, the convention proceeds to vote.¹ The roll of states is called again, and the delegations, through their chairmen, announce their votes. Under earlier Republican procedure, each delegate might usually vote as he liked; although sometimes he was bound by instructions from the party organization at home. In any case, he had a right to have his vote separately recorded. If, as often happened, a delegation cast its entire quota of votes for a given candidate, this was only by coincidence, or, at the most, voluntary agreement. The Democrats followed the different plan of permitting the state convention to require the delegates to the national convention to cast their votes in a block for one candidate; and even if no such requirement was imposed, the delegation itself might, by majority vote, determine how the electoral votes of all of its members should be recorded. This historic "unit rule" conformed to the states' rights antecedents of the Democratic party, and it had the practical advantage of augmenting the power and importance of a state in the convention's proceedings. The rise of the presidential primary, however, entailed some modification in the practice of both parties. On the one hand, the Republicans gave somewhat larger recognition, unofficially, to the principle of instructed delegations. On the other hand, the Democrats found it necessary to relax the rigor of the unit rule. This they did in 1912 by adopting a new regulation permitting delegates to have their votes counted independently of the unit rule if their states (a) required election by congressional districts and (b) had not expressly subjected the district delegates to the authority of the state convention or state committee.² In all other cases, the unit rule is still to be recognized and enforced. Another important difference of practice between the two major parties is that whereas a simple majority of all votes cast is sufficient to nominate in a Republican convention, the Democrats require two-thirds. The "unit rule" and the "two-thirds" rule are closely connected. As long as the former is main-

¹ No printed or written ballots are employed in national conventions; all voting is oral. The term "ballot" is, however, commonly used to designate a vote.

² *Official Report of the Democratic National Convention of 1912*, pp. 59-76.

tained, even in the modified form of 1912, the latter is practically necessary to prevent a few large states from completely controlling the nominations. But there has been strong demand for the abrogation of both.¹

CHAP.
XV

After the votes of all of the states have been recorded and counted, the result is announced. Sometimes a single ballot suffices. But more often the votes are so distributed among several candidates that no one has the requisite majority and other ballots must be taken. Gradually, as the voting proceeds, candidates whose cause is recognized to be hopeless cease to have more than a straggling support or drop out altogether, and their votes are bestowed elsewhere, until at length some one of the contestants—or, if necessary, a “dark horse”—emerges a victor. Sometimes the contest is very prolonged. Forty-nine ballots were required to nominate Franklin Pierce in 1852, and fifty-three to nominate General Scott in the same year. Garfield was nominated on the thirty-sixth ballot in 1880, and Woodrow Wilson on the forty-sixth in 1912. The extremest case, however, was the nomination of John W. Davis on the one hundred and third ballot in 1924.

The
balloting

The nomination for the presidency having been made, the wearied convention hurries its work to a conclusion. A nomination for the vice-presidency is still to be decided upon; and the same procedure—roll-call, nominating and seconding speeches, and balloting—is followed. But the contest is usually not very keen, and a decisive vote is soon reached. As a rule, the choice is determined largely by the relative “availability” of the candidates in the light of the selection that has been made for the presidency. An eastern presidential nominee, for example, calls for a western vice-presidential nominee; an arch-conservative must usually be counterbalanced with a man of known liberal views. If the vice-presidential candidate will improve the party’s prospects in a doubtful state or group of states, or will lend popularity to the ticket the country over, so much the better. But on the whole, in the words of a recent writer, the office is “lightly esteemed and carelessly bestowed.”

Nom-
inating
the vice-
president

Having elected—or at all events endorsed—the new national committee (whose members are actually selected in the various

¹ The two-thirds rule was decreed by President Jackson in connection with the Democratic convention of 1832, and has prevailed in every convention of the party since that time except in 1840. On more than one occasion it has prevented the party’s strongest candidate from receiving the nomination. It probably did so in 1924.

ways indicated above), the convention authorizes the chairman to appoint two special committees consisting of a representative from each state to bear formal notification to the candidates; and thereupon it adjourns *sine die*.

At an early date the new national committee meets, and a chairman is chosen, nominally by the committee, though actually by the presidential candidate. In due time sub-committees and auxiliary committees are made up; a treasurer is appointed; headquarters are opened, usually in both an eastern and a western city; a "campaign text-book" (containing the platform, notification and acceptance speeches, biographies of the candidates, statistics and testimonials tending to substantiate party arguments, and much miscellaneous material) is published and widely distributed; a speakers' bureau is organized; and under the supreme direction of the national chairman an appeal for votes is launched which is kept up, with increasing ingenuity and intensity, throughout the four months or more during which the campaign lasts.¹ Meanwhile, in each state, the parties make up their lists of presidential electors, in some states by the use of the primary, in others by convention nomination; and ballots are prepared on which the lists of electors are printed in parallel columns, under the appropriate party symbols. When the people finally go to the polls, they think of themselves as voting for president and vice-president; and, barring certain contingencies to be mentioned, they do actually determine who shall fill these two offices. In form, however, they vote only for the electors; and sometimes the names of the presidential and vice-presidential candidates do not appear anywhere on the ballot.² In 1924 the total number of men and women of voting age (but without reference to other qualifications) was almost fifty-seven millions, and the number of votes cast for all tickets in the field was slightly over twenty-nine millions.

By national law of 1845, presidential electors are chosen in all states on the same day, *i.e.*, the Tuesday following the first Monday in November; and an act of 1887 requires the electors to meet and vote in all states on the second Monday of the following January. There is no national law, however, on the method of choosing the

¹ The organization and methods of the campaign are described more fully in Chap. XXXII.

² On the other hand, at least three states (Illinois, Nebraska, and Iowa) omit the names of electors from the ballot and print only the names of the presidential and vice-presidential candidates.

electors. On the contrary, the constitution prescribes that this shall be determined in each state by the legislature thereof. Originally, the choice was made in most cases by the legislature itself; in 1792 the legislature elected in nine states, the people in five. But the principle of popular election gradually won favor, and after 1832 the electors were thus chosen in all states except South Carolina, where the legislature continued to elect until after 1860.¹

CHAP.
XV

In states in which the electors were from the first chosen by the people, it was at one time not unusual to employ a district system, under which one elector was chosen by the voters of each congressional district and two were elected by the voters of the state at large. The competition of political parties, however, caused this plan to lose favor. Under the district system the electoral vote of a state was likely to be divided among two or more candidates. To win the full vote it was necessary for a party to carry every district. The alternative was, of course, a general ticket system, under which a party could make a clean sweep merely by securing a plurality throughout the state as a whole. Enhancing, as it did, the general importance of a state in national politics, this plan won the support both of party leaders and of public sentiment. In 1832 only four states retained the district system; and they soon gave it up. Michigan adopted it in 1891, but only temporarily.² The general ticket system does not, it should be noted, absolutely preclude division of a state's electoral vote. A fusion agreement between two parties may result in a parcelling of the vote, on predetermined lines.³ Or, without any fusion, a sufficient number of voters may "scratch" the ticket, *i.e.*, vote for electoral candidates on two or more lists, to prevent any party

District
and gen-
eral ticket
systems

¹ Colorado temporarily reverted in 1876 to the legislative method.

² The Democratic legislature of a state which was normally Republican sought in this way to ensure that in the approaching presidential election the Democrats would secure a share of the electoral votes. The plan succeeded; nine Republican and five Democratic electors were chosen. But when the Republicans regained control of the legislature, the general ticket system was reinstated. The general ticket system gives an enormous political advantage to the party that is dominant in a state. A reversion to the district system is, accordingly, always pretty certain to be temporary; "when the normally dominant party regains control of the legislature the law is repealed, or if the party that enacted it becomes dominant it is for the same reason repealed." J. C. Allen, "Our Bungling Electoral System," *Amer. Polit. Sci. Rev.*, XI, 587 (Nov., 1917). The Michigan law of 1891 was sustained by the Supreme Court in *McPherson v. Blacker*, 146 U. S., 1 (1892).

³ The best illustration is the agreements between Democrats and Populists in a total of twenty-six states in 1896. E. Stanwood, *History of the Presidency*, I, 564-5.

from securing all of the places. This actually happened in Maryland in 1908 and in California in 1912. But such results are rare.

"Minority"
presidents

A plurality wins; and this leads to mention of the noteworthy fact that several presidents have been "minority" presidents, in the sense that they (strictly, the electors who chose them) were voted for by fewer than half of the people who went to the polls. Lincoln, in 1860, obtained only a plurality, not a majority, of the popular vote. Wilson, in 1912, received two million more popular votes than did his nearest competitor, Roosevelt; yet he lacked a majority. In both of these cases the opposition was unusually divided. But the same thing can happen under entirely normal circumstances, even if there are but two tickets in the field. Hayes was elected over Tilden in 1876, although his popular vote was smaller, whether the Republican or the Democratic count be accepted; and Harrison triumphed over Cleveland in 1888, although with one hundred thousand fewer votes. Indeed, in the last twelve elections, the successful candidate has received a majority of the popular vote only seven times. All that a candidate needs in order to obtain the full electoral vote of a state is a plurality of the popular vote in that state. Popular pluralities, no matter how small, in a sufficient number of states—and no very great number, if the list includes states like New York, Pennsylvania, and Illinois, having numerous electoral votes—ensure election. Wilson's six million popular votes in 1912 were so distributed as to win 435 electoral votes; Roosevelt's four million were so distributed (involving pluralities in only six states) as to win only 88; Taft's three and one-half million curiously contained only two pluralities, *i.e.*, in Vermont and Utah, and won only eight electoral votes.

The fact that the entire electoral vote of a state falls to the candidates who poll a mere plurality of the popular vote leads the parties to concentrate their campaign efforts upon doubtful states, especially those which have a large electoral vote. New York is such a state; and the party managers are never likely to forget that in 1884 fewer than six hundred popular votes swung that state's thirty-six electoral votes to Grover Cleveland, and that it was these votes that made him a victor over the Republican candidate.¹ This intensification of party activity in pivotal states is disadvantageous in that it presents a special temptation to party workers to resort to bribery and other corrupt or dubious practices.

¹ J. C. Allen, "Our Bungling Electoral System," *Amer. Polit. Sci. Rev.*, XI, 690-691 (Nov., 1917).

The theory of the constitution is that the electors are officers of their respective states, and it was on this account that the states were left free to determine how they should be chosen. The place where each group meets within its state is determined by the legislature thereof (being, naturally, the state capital); and if the electors receive any remuneration for their services, it must come out of the state treasury. National law, however, requires that in all cases they must meet and vote on the second Monday of January following their election. And the Twelfth Amendment of the national constitution enjoins that the voting shall be by ballot; that presidential and vice-presidential candidates shall be voted for separately; that distinct lists shall be made up showing all persons voted for for either office, with the number of votes received by each; and that these lists, signed and sealed, shall be transmitted to the president of the Senate at the seat of the national government. As evidence of their power to act, the electors transmit also their certificates of election, bearing the signature of the governor.

CHAP.
XV

Casting the
electoral
vote

The constitution is curiously vague on the counting of the electoral vote; and out of that circumstance arose, in 1876, a very serious dispute. The Twelfth Amendment says that "the president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." But who shall make the count? The constitution is silent. It might be inferred that the president of the Senate is himself to do it; and for more than a quarter of a century this was the practice. But suppose that conflicting returns are sent in from a state. Who shall decide which returns shall be received and which ones shall be rejected? Such a question actually arose in connection with the election of 1820, and Congress itself took jurisdiction.

Counting
the elec-
toral vote

On this basis, matters went along well enough until 1876. Then, however, a situation developed which startlingly revealed the inadequacy of existing arrangements. Tilden, the Democratic candidate, received 184 undisputed electoral votes; Hayes, the Republican candidate, received 164; from four states—Oregon, Florida, South Carolina, and Louisiana, with a total of twenty-one electoral votes—came conflicting returns. Tilden lacked only one vote of a majority; which meant, of course, that if any one of the contests was decided in his favor he would become president. The Senate was Republican, the House of Representatives was Demo-

The
disputed
election
of 1876

CHAP.
XV

cratic; and the rules required that no electoral vote whose validity was questioned should be counted unless the two houses, acting separately, should concur.¹ For obvious reasons, neither house desired this regulation to apply in the present case. Accordingly, it was repealed, and after much controversy an extra-legal body—an electoral commission consisting of five senators, five representatives, and five justices of the Supreme Court—was created to examine into and decide the several disputes. The commission included eight Republicans and seven Democrats, and, whether or not for this reason, every contest was decided in favor of Hayes, who was accordingly elected, without a vote to spare. The country was kept in suspense until within two days of the time for the new president to be inaugurated.

The
Disputed
Presiden-
tial Elec-
tions Act

When the excitement died down, public-spirited men of both parties sought means of preventing a recurrence of the difficulty. Many intricate questions, however, were involved, and remedial legislation was delayed until 1887. The Disputed Presidential Elections Act of that year covers the ground in a reasonably comprehensive manner.² The procedure to be followed in counting the electoral vote is laid down step by step, and responsibility for settling disputes is thrown back upon the states. In view of the fact that the electors are state officers whose appointment is certified by the governor, and who meet and discharge their one duty within the state and under state authority, this disposition of the matter is entirely logical. Plural returns are not made absolutely impossible. But in cases of dispute, tribunals appointed by and in each state affected are to determine what electoral votes from the state are to be regarded as valid. Only in the event that no such tribunal is appointed, or that two rival tribunals send in conflicting reports, will it fall to Congress to make a decision. If, under these circumstances, the houses differ, the state loses its vote altogether. Congress, however, retains power to reject the returns from a state, even though there is no dispute, if the two houses decide, first separately and afterwards jointly, that the vote or votes have not been "regularly given" by electors whose appointment is duly certified.

Shortcom-
ings of the
present law

It cannot be said that this settlement is ideal, or necessarily final. In the first place, its constitutionality has been questioned,

¹ This "twenty-second joint rule" dated from 1865.

² For a full account, see J. H. Dougherty, *The Electoral System of the United States*, Chap. ix.

on the ground that the constitution does not authorize Congress to exercise any control whatever over the electoral system.¹ In the second place, there are practical objections. If a dispute comes to Congress, and the two houses fail to concur, the vote of the state affected is lost altogether. It may, perhaps, be said that if a state cannot settle its own disputed elections it ought to be made to pay this penalty. Nevertheless, such disfranchisement is inherently undesirable. But more serious is the possibility that a deadlock between the two houses of Congress may cause the title to the presidency and vice-presidency to be still in doubt when the fourth of March arrives. Fortunately, no occasion has arisen to test the existing law. An experience of the kind would undoubtedly give impetus to the oft-made proposal that the whole matter be regulated in a constitutional amendment which, among other things, should provide for some arbiter between the two houses in case of disagreement during an electoral count.

Ordinarily, of course, the counting of the electoral votes is a mere formality; the country knows three months in advance what the result will be. On the second Wednesday in February—a month after the electors have met in the respective states—the members of the two houses gather in the hall of the House of Representatives, with the vice-president (or president *pro tem.* of the Senate) in the chair. Two tellers have previously been appointed by each house. Starting with Alabama, and proceeding in strict alphabetical order, the presiding officer opens the certificates transmitted by the several electoral bodies, hands them to the tellers, who read them aloud and record the votes, and announces the outcome, which is duly entered, with a list of the votes, in the journals of the two houses. The person receiving the greatest number of votes for president, provided the number is a majority of the whole number of electors chosen, is declared elected; and similarly in the case of the vice-presidency. If there is no majority for president, the House of Representatives, voting by states, proceeds to elect. Each state, in such a contingency, has one vote, which is bestowed as the majority of the state's representatives determine. Until 1804, as we have seen, the choice of the House was made between the candidates who were tied, if there was a tie, or among the five highest on the list, if there was simply a lack of a majority. The Twelfth Amendment, however, provided for a choice among the highest "not exceeding three." The majority of all the states is

¹ W. W. Willoughby, *Constitutional Law of the United States*, II, 1132-1134.

necessary to elect. If no candidate for the vice-presidency obtains a majority of the electoral vote, the Senate—the members voting as individuals—choose from the highest two, and a simple majority elects.¹

Choice by
the House
of Repre-
sentatives
in 1825

Since 1801, the president has been chosen by the House only once, *i.e.*, in 1825. The electoral vote of that year stood: Jackson, 99; Adams, 84; Crawford, 41; Clay, 37. Clay was popular in the House and might have been elected if he could have been considered in the voting. As it was, he threw his strength to Adams, who was accordingly successful. Jackson had received the greatest number of votes in the electoral college, and his friends could never be convinced that he had not been grievously wronged in being passed over by the House. They charged Adams and Clay with entering into a "corrupt bargain," and launched a new campaign which easily landed their favorite in the White House in 1829. The whole proceeding, however, had been entirely constitutional, and talk of further changing the electoral system died down without producing any result.²

Possible
failure
of such
choice

It is clearly possible that this alternative method of election by the House of Representatives might fail. With three candidates in the field, a majority of state delegations might not be obtainable for any one of them. In that event, the newly-elected vice-president would, on March 4, become president. But if the presidential election were thrown into the House, the vice-presidential election would be likely to be thrown into the Senate; and the senators, voting as individuals, might conceivably dead-lock on the two candidates before them. During the three-cornered campaign of 1924, the political complexion of the two houses was such as to bring these embarrassing contingencies into view and cause a considerable amount of public uneasiness. The results of the polling showed that there had been no real ground for apprehension. None the less, many people felt that it ought not to be left even remotely possible for March 4 to arrive with no president-elect or vice-president-elect ready for inauguration as chief executive. The best legal opinion has been that, as matters stand, the secretary of state—being by the act of 1886 next in line of succession after the vice-president, and being not restricted to a four-year term—would become acting president, should such a situation

¹ For a description of the electoral count in 1925, see *N. Y. Times*, Feb. 11, 1925.

² E. Stanwood, *History of the Presidency*, I, Chap. XI.

arise; although whether he would serve a regular term of four years or whether Congress would arrange for a new election has been a matter of doubt.¹

CHAP.
XV

The question of altering the method of electing the president and vice-president has been discussed from time to time throughout our entire national history. The Twelfth Amendment remedied certain defects, and various statutes, *e.g.*, the Disputed Presidential Elections Act, dealt acceptably with others. But the chief anomaly remains, namely, the electoral college. This institution serves no purpose for which it was created; the people choose the president quite as truly as if they voted directly for him, and the electors merely go through the formality of translating the results into the form required by an archaic section of the constitution. Why not abolish the electoral college altogether and permit the people to choose the president in form as well as in fact?

Proposed
changes of
electoral
system

The proposal is plausible, yet it raises questions of some difficulty. Should the people of the country as a whole, without reference to state or other interior lines, elect by a simple plurality or majority vote? Or should they vote by states, or by districts? The proposal to throw the entire country into one grand constituency and elect by a majority or plurality of the total popular vote has met with small favor.² If any change is ever made it is likely to preserve to the states, as such, some distinctive part in the electoral process. Two main possibilities suggest themselves: (1) direct popular vote for president and vice-president, election to be by, perhaps, a popular plurality in a majority of states; (2) direct popular vote, to be converted automatically, without the intermediation of the present electors, into an electoral vote, and election to be by a majority or plurality of this electoral vote. The first plan is objectionable because it would enable a number of the smaller states to swing the election by means of only a minority of the total popular vote; although it is not to be forgotten that we have "minority" presidents under the existing system.³

Furthermore, save for the elimination of the electoral college, the second plan offers no certain gain, except under one condition:

¹ A bill introduced in the House of Representatives in December, 1924, proposed to extend the succession act of 1886 so as specifically to cover cases of failure to elect; also it was suggested by various members of Congress that a commission be appointed to make a study of the subject. There have been, however, no further developments.

² For objections to it, see J. C. Allen, "Our Bungling Electoral System," *Amer. Polit. Sci. Rev.*, XI, 703 (Nov., 1917).

³ See p. 226.

if the electoral vote of the state were to be determined on a district basis rather than on a general ticket basis, a way would be opened for some degree of proportional representation, and it would not happen, as it does now, that a state's entire electoral vote would go to a given candidate notwithstanding that the popular vote was almost evenly divided. As is evidenced by the action of Michigan in 1891, supported by a decision of the Supreme Court,¹ there is no legal obstacle to the employment of the district plan today. The considerations of state pride and party advantage which originally caused the district system to be abandoned are, however, no less influential in our time than formerly. Only by a constitutional amendment could the plan be put into uniform use throughout the country; and, notwithstanding its manifest advantages over the present system, its advocates can hardly hope for its adoption. Its one obvious disadvantage would be the increased temptation to party forces within the several states to gerrymander the electoral districts.²

REFERENCES

The Federalist, No. LXVIII.

A. C. McLaughlin and A. B. Hart [eds.], *Cyclopædia of American Government* (New York, 1915), II, 8-46.

E. Stanwood, *History of the Presidency* (Boston, 1906-16), I, Chap. I.

E. M. Sait, *American Parties and Elections* (New York, 1927), Chaps. XVII-XVIII.

P. O. Ray, *Introduction to Political Parties and Practical Politics* (3rd ed., New York, 1924), Chaps. VIII-X.

R. C. Brooks, *Political Parties and Electoral Problems* (New York, 1923), Chaps. XI-XII.

H. R. Bruce, *American Parties and Politics* (New York, 1927), Chaps. XIII-XIV.

J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), II, Chaps. LXIX-LXXIII.

J. A. Woodburn, *Political Parties and Party Problems in the United States* (rev. ed., New York, 1914), Chaps. X-XIII.

E. Kimball, *National Government of the United States* (Boston, 1920), Chap. VII.

H. W. Horwill, *The Usages of the American Constitution* (London, 1925), Chap. II.

M. Ostrogorski, *Democracy and the Organization of Political Parties* (New York, 1902), II, Chaps. III-V.

¹ See p. 225.

² Without in any wise disturbing the present distribution of electoral power, the electoral college could be dropped out of the system by a simple constitutional amendment providing a way of translating a state's popular vote into an electoral vote without the intermediation of personal electors. But there is no sufficient impetus to lead to such action.

NOMINATION AND ELECTION OF THE PRESIDENT 233

- J. H. Dougherty, *The Electoral System of the United States* (New York, 1906), CHAP. XV.
Chaps. I-V, IX-XIII.
- L. T. Beman, *Abolishment of the Electoral College* (New York, 1926).
- F. W. Dallinger, *Nominations for Elective Offices in the United States* (New York, 1897), Chaps. IV, VI.
- L. Overacker, *The Presidential Primary* (New York, 1926).
- C. S. Potts, "The Convention System and the Presidential Primary," *Rev. of Revs.*, XLV, 561-566 (May, 1912).
- , "The Unit Rule and the Two-Thirds Rule," *ibid.*, 705-710 (June, 1912).
- C. Becker, "The Unit Rule in National Nominating Conventions," *Amer. Hist. Rev.*, V, 64-82 (Oct., 1899).
- J. C. Allen, "Our Bungling Electoral System," *Amer. Polit. Sci. Rev.*, XI, 685-710 (Nov., 1917).
- W. MacDonald, "When Congress Elects the President," *Curr. Hist.*, XXI, 41-46 (Oct., 1924).
- C. G. Hoag, "The Election of the President; a Proposed Constitutional Amendment," *Proportional Representation Rev.*, 3rd series, No. 71, pp. 98-105 (July, 1924).
- T. F. Moran, *American Presidents* (New York, 1917).
- J. B. Bishop, *Presidential Nominations and Elections* (New York, 1916).
- W. J. Bryan, *A Tale of Two Conventions* (New York, 1912).
- W. F. McCombs, *Making Woodrow Wilson President* (New York, 1921).
- K. H. Porter, *National Party Platforms* (New York, 1924).
- P. L. Haworth, *The Hayes-Tilden Disputed Presidential Election of 1876* (New York, 1906).
- Official Report of the Republican National Convention*, issued quadrennially;
ibid., *Democratic National Convention*.

CHAPTER XVI

THE PRESIDENT AS CHIEF EXECUTIVE

Parliamen-
tary and
presiden-
tial gov-
ernments

The founders of our government broke with the trend of English political development by establishing an executive of the presidential, rather than the "parliamentary," or cabinet, type. In actual practice, the difference between the two forms is not as great as the theory of the thing would lead one to suppose. Nevertheless, the two represent radically different solutions of one of the major problems in any governmental system, *i.e.*, the relation between the legislature and the executive. A "parliamentary," or cabinet, executive is composed normally of members of the legislature, is directly responsible to the popular branch of the legislature, and holds office only so long as it commands the support of a working majority in that body. The legislature is the supreme authority, even though in practice the cabinet may, as in contemporary Britain, so largely direct the legislature's proceedings as to be, to all intents and purposes, the controlling force. The British cabinet is the best-known executive of this type, although the cabinets of France, Germany, Canada, Australia, and numerous other countries are equally good examples. A presidential executive, on the other hand, is entirely outside the legislature, is not responsible to the legislature in any manner affecting the executive tenure, and takes rank as a distinct branch of the government, coördinate with the legislative branch. This is the sort of executive that we have in the United States, both in the state governments and in the national government. It was adopted for the reason that, despite the election of the governor by the assembly in colonial Rhode Island and Connecticut, our political experience up to 1775-89 did not point to a parliamentary system. Rather, it was such as to lead the makers of our constitutions to aim at the preservation of liberty through a balance of power among separate and coördinate branches of government.¹

¹ The parliamentary and presidential types are compared in W. H. Taft, *Our Chief Magistrate and his Powers*, Chap. I; H. L. McBain, *The Living Constitution* (New York, 1927), Chap. IV; C. G. and B. M. Haines, *Principles and Problems of Government* (rev. ed., 286-302); W. W. Willoughby and L. Rogers,

The president, therefore, as chief executive in the national government, occupies a detached position and has power and functions which in most cases are quite different from those of Congress and the courts. Some of his powers are expressly conferred in the constitution, *e.g.*, the appointment of civil and military officers (with the advice and consent of the Senate) and supreme command of the army and navy. Only a few brief clauses¹ are, however, devoted to this subject, and a large part of presidential power arises, rather, from implication and interpretation. Much can be inferred—to cite a single illustration—from the pledge required of the president at his inauguration to “preserve, protect, and defend the constitution.” Still other powers spring from acts of Congress, passed in pursuance of its own direct or implied powers, and assigning to the president specific tasks and responsibilities. When, for example, Congress establishes a new executive department, a new diplomatic post, or a new commission, it automatically extends the president’s power of appointment. When it passes a tariff act, such as that of 1909, authorizing the president to apply, at his discretion, a special scale of duties, it obviously puts into his hands an important power over foreign trade.

A question that has often been discussed is whether the president has inherent executive power. Does he have power, outside of the constitution and laws, simply because he is the chief executive? On one occasion the Supreme Court inclined to this view;² and ex-President Roosevelt expressed the belief that it is not only the president’s right, but his duty, “to do anything that the needs of the nation demand unless such action is forbidden by the constitution or the laws.” The basic fact of our government is, however, that it is a government of limited powers—of such powers only as are enumerated or implied in the constitution, which clearly means that no executive power, or power of any other sort, is inherent. “The true view of the executive functions is, as I conceive it,” says ex-President Taft, “that the president can exercise no power which cannot be reasonably and fairly traced to some

CHAP.
XVISources
of the
president's
executive
powerThe ques-
tion of
inherent
power

Introduction to the Problem of Government, Chaps. xvii-xviii; A. V. Dicey, “A Comparison between Cabinet and Presidential Government,” *Nineteenth Century*, LXXXV, 25-42 (Jan., 1919); W. Wilson, *Congressional Government* (Boston, 1885); and W. MacDonald, *A New Constitution for a New America* (New York, 1921).

¹ Art. II, §§ 2-3.

² In the Neagle case (135 U. S., 1). See W. H. Taft, *Our Chief Magistrate and his Powers*, 88-91; W. W. Willoughby, *Constitutional Law of the United States*, II, 1152-1154.

specific grant of power or justly implied or included within such express grant as necessary and proper to its exercise. Such specific grant must be either in the constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest."¹

The broadening out of the president's powers by interpretation and statutory elaboration has, however, gone so far as to make the sum total of presidential authority immeasurably greater than the constitution's framers intended it to be. Much depends, of course, upon the personality of the president himself; under an Andrew Jackson or a Theodore Roosevelt there is naturally an augmentation of influence, if not a definite expansion of power. The character of the times also makes a difference; in the Civil War, and again in the World War, the presidency rose to heights of authority undreamed of in days of peace. Regardless, however, of both personalities and circumstances, the president has come to be—with the possible exception of the prime minister in cabinet-governed countries like Great Britain and France—the most powerful executive officer in the world. Among the three great branches into which our national government is divided, the executive is the only one whose development in the past hundred years has been at the expense of the other two.²

Viewed comprehensively, the president's powers and functions fall into two main groups, according as they are executive or legislative; and to these may be added the extra-constitutional, but exceedingly important, function of party leadership. Executive powers fall, in turn, into five chief categories: (1) appointment and removal of officers; (2) direction of executive and administrative work; (3) management of foreign relations; (4) control of the military and naval establishments; and (5) pardon and reprieve. These several forms of presidential executive activity will be described briefly in the order indicated.³

Outside of the members of Congress, only two officials in the national government are elected, namely, the president and the vice-president.⁴ All others are appointed. The power to appoint

¹ *Our Chief Magistrate and His Powers*, 139-140.

² E. Stanwood, *History of the Presidency from 1879 to 1909*, p. 215.

³ Legislative and party functions are considered in the following chapter.

⁴ Accuracy requires it to be noted, however, that each house of Congress chooses its own officers, except that the vice-president of the United States is *ex officio* president of the Senate.

is vested fundamentally in the president; and no monarch or minister in any foreign land has as much actual control over the filling of public offices as does he. His power in this direction is, nevertheless, subject to several important limitations. In the first place, by constitutional provision, he appoints, not independently, but "by and with the advice and consent of the Senate"—which means, concretely, the favorable action of a majority of the senators present when a given appointment comes up for consideration. As was explained by Hamilton in *The Federalist*, this arrangement was adopted, not in order to relieve the president of responsibility for appointments, but to check any spirit of favoritism which he might display and to prevent the appointment of "unfit characters from state prejudice, from family connection, from personal attachment, or from a view to popularity."¹

CHAP.
XVI

Restrictions:

(a) Advice and consent of the Senate

It long ago became customary for the Senate to endorse, as a matter of course, the president's selections for the highest positions in the executive departments. The heads of departments constitute his official body of advisers, *i.e.*, cabinet; besides, he, as the chief of the executive branch, is directly responsible for their acts; and on both grounds it is only fair that in choosing them he shall have rather complete freedom.² Rarely, too, are nominations to judgeships and diplomatic positions rejected. But elsewhere the power to confirm or reject is employed freely, and the president must be prepared, in case one nominee fails, to offer another or to see the office in question stand vacant. The number of senatorial rejections naturally varies according to circumstances. If the president and Senate are on good terms, and especially if the president's party commands a senatorial majority, nominations are likely to be approved almost automatically. If, however, there are party differences or feuds of any kind, rejections or refusals to act will be relatively numerous.³

In any case, much deference is paid the long-established custom known as "senatorial courtesy." Nominees have commonly been brought to the president's attention and their claims advocated,

"Senatorial courtesy"

¹ No. LXXVI (Lodge's ed., 474).

² There have been only six instances of senatorial rejection of nominees for department headships. The most recent was the rejection of Charles B. Warren for the post of attorney-general in March, 1925.

³ During a recess of the Senate the president may make temporary appointments to positions requiring confirmation. But these lapse at the end of the Senate's next session unless confirmed; although in such a case there is nothing except considerations of expediency to prevent reappointment of the same man the moment the Senate adjourns.

or they have been opposed as against other candidates, by one or both of the senators from their state, and under the rule of courtesy referred to the Senate will confirm or reject according to the wishes of the member or members immediately interested. If the president sends in the name of a resident of Cleveland to be collector of internal revenue in his district, the Senate will normally confirm if the nominee is satisfactory to the senator or senators from Ohio, and otherwise will reject—unless, of course, these senators are not of the party to which the president belongs. Senatorial action on proposed appointments often turns, therefore, on considerations other than the fitness of the nominee. Yet there are comparatively few rejections for which some good reason cannot be assigned. The president has every incentive to propose men who are not inherently objectionable and who, having the backing of the senators of their state—or of the leaders of the president's party in the state if the senators belong to a different party—are practically assured in advance of confirmation.

(b) Ap-
pointment
of inferior
officers by
the courts
and heads
of depart-
ments

A second limitation upon the president's power of appointment arises from authority given Congress by the constitution to vest the appointment of such "inferior officers" as it thinks proper, not only in the president alone, but in the courts of law, or in the heads of departments.¹ The constitution nowhere defines the term "officer," nor does it say who are to be considered "inferior officers;" and no very clear delimitations have established themselves in practice. About all that can be said is that the constitution requires certain kinds of officers—ambassadors, other public ministers and consuls, and judges of the Supreme Court—to be appointed by the president and Senate, and that outside of this small group it is for Congress to say who are "inferior officers" and to provide, if it likes, for their appointment by any one of the three special agencies named. This power has been exercised repeatedly: the president has been given sole control of certain appointments, *e.g.*, the librarian of Congress; the courts have been authorized to select their own clerks; and the heads of departments have been empowered to choose great numbers of subordinates. How far this disintegration of the appointing power has gone is indicated by the fact that, in a total of five hundred and sixty thousand officers and employees in the national executive and administrative service, somewhat less than seventeen thousand are nowadays put in their positions by action of the president and the

¹ Art. II, § 2, cl. 2.

Senate. Postmasters in larger cities, collectors of customs and internal revenue, superintendents of the mints, members of such federal bodies as the Interstate Commerce Commission and the Federal Trade Commission, heads of departments, and many bureau chiefs—all of these, with some other groups, are still “presidential” offices; and some of them are clearly not “inferior,” in any ordinary sense of the word. Nevertheless, the term is very flexible, and there is nothing except considerations of propriety and expediency to prevent Congress from transferring the appointment of any of the officers named—even the heads of departments—from the president and Senate to some other recognized appointing agency.

In making appointments the president is further limited by certain practical conditions. The utter impossibility of personally knowing the qualifications of most of the candidates forces him to rely on other people for information and guidance; and in most appointments the initiative is taken by a senator or representative rather than by the president himself.¹ Appointments are often practically dictated, too, by the necessity of conciliating a wing of the party, or meeting a demand of a particular section of the country. And by no means the least important limiting condition is the difficulty of finding men who will accept arduous and responsible positions at the meager salaries in many instances provided.

The constitution makes all civil officers of the United States liable to removal by impeachment, but only upon conviction of treason, bribery, or other high crimes and misdemeanors. Obviously, there must be removals for incompetency, neglect, and other reasons which have no relation to the specified grounds for impeachment, and the question of how such removals should be made forced itself upon the attention of Congress almost immediately after the new government under the constitution was set up. Two opposing views appeared. One was that, in the absence of any provision in the constitution, the power to remove should be implied from the power to appoint and should be exercised by the same authorities that made appointments, *i.e.*, in many cases the president and Senate. Alexander Hamilton was strongly of this opinion. The other view was that if the president was required to obtain the consent of the Senate to removals, the resulting refusals and delays would seriously impair the efficiency of the service, and that, therefore, the president ought to be in a position to

CHAP.
XVI(c) Other
limiting
conditions

Removals

¹ W. H. Taft, *Four Aspects of Civic Duty*, 98.

CHAP.
XVINo sena-
torial re-
striction.

remove officials by his own independent action. Madison argued convincingly for this view, and it finally prevailed.

In 1867 Congress, actuated by hostility to President Johnson, passed over his veto a tenure of office act which provided that, while the president might suspend a civil officer when the Senate was not in session and accordingly could not act on the case, he should definitely remove no such officer except with the consent of that body.¹ This measure, however, was partly repealed in 1869, and was rescinded altogether in 1887; and it has long been generally conceded that Johnson was correct in his view that it was unconstitutional.² The president cannot remove judges, who hold office during good behavior and are removable only by impeachment; and he may remove officials who secure appointment under the merit system only "for such causes as will promote the efficiency of the service."³ But otherwise he can remove any civil officer of the United States at any time, for any reason, and without giving any explanation; and this is no less true of officers appointed for the customary four-year term prescribed by various tenure of office acts, *e.g.*, of 1820 and of 1836, than of those whose tenure is indefinite.

The
Myers
case
(1926)

Such was the ruling of the Supreme Court in the case of *Parsons v. United States*, decided in 1890.⁴ Even after this decision, however, some doubt remained as to whether the president's power to remove officers whom he had appointed with the consent of the Senate could in any way be restricted by Congress. Answer to this query was supplied in 1926 in one of the most important Supreme Court decisions in recent years.⁵ A statute passed in 1876, and still in force, provides that "postmasters of the first, second, and third classes shall be appointed and may be removed by the president by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law." In 1920 President Wilson, without consulting the Senate, removed Frank S. Myers, first-class postmaster at Portland,

¹ This applied, of course, only to officers appointed with the advice and consent of the Senate.

² During the period while it was in force, the statute never came before the courts in such a way as to lead to a decision upon its validity. But the Supreme Court later intimated strongly that it was unconstitutional, and in the *Myers* case in 1926 (to be mentioned presently) it definitely so declared.

³ See p. 293. This restricting clause is so elastic that, in practice, it is possible for the president to bring about almost any removal of a merit appointee that he desires.

⁴ 167 U. S., 324.

⁵ *Myers v. United States*, 272 U. S., 52.

Oregon, whom he had appointed in 1917. Myers protested against his removal in every way open to him at the time, and when the four-year period for which he had been appointed had expired he sued in the Court of Claims for the salary of which his removal had deprived him. Without touching the constitutional question, the Court of Claims gave judgment against the plaintiff on the ground of undue delay in suing; whereupon the case was appealed to the Supreme Court. The question was whether the act of 1876—which had been palpably violated in Myers' removal—was valid; and for the first time in history the government, through the Department of Justice, appeared in the Supreme Court to attack the constitutionality of an act of Congress. In a six-to-three decision, based partly on the historical "decision of 1789" and partly on the inferential argument that the removal power is part of the president's broad grant of executive authority which under the doctrine of separation of powers cannot be abridged by Congress, the Court held the statute of 1876 unconstitutional in so far as it attempted to place restriction upon the power of the president to remove officers appointed by him with the consent of the Senate. The opinions rendered by the three dissenting justices were weighty; some constitutional lawyers regard them as superior to the majority opinion, both in historical accuracy and in logic. However that may be, the question—curiously left unsettled for one hundred and thirty-seven years—is now to be deemed closed; the removal of Myers was constitutionally and legally proper, and no action by Congress can in future operate to restrain the president from any removal of the kind which seems to him desirable. Whether his power to remove an officer appointed by him alone is similarly beyond the competence of Congress to curtail is not settled, although the reasoning of the court seems broad enough to apply equally to this type of appointment.¹

The effect of the decision is thus to give the president full rein in the matter of removals. Except in the case of judges,² "he

CHAP.
XVI

Effects of
the Myers
decision

¹R. E. Cushman, "Constitutional Law in 1926-1927," *Amer. Polit. Sci. Rev.*, XXII, 70-77 (Feb., 1928); E. S. Corwin, "Tenure of Office and the Removal Power under the Constitution," *Columbia Law Rev.*, XXVII, 353-399 (Apr., 1927); H. L. McBain, "Consequences of the President's Unlimited Power of Removal," *Polit. Sci. Quar.*, XLI, 596-603 (Dec., 1926); T. R. Powell, "Spinning Out the Executive Power," *New Republic*, XLVIII, 369-371 (Nov. 17, 1926). The briefs, oral arguments of counsel, and opinions of the Court in the Myers case will be found in 69th Cong., 2nd Sess., Senate Doc. No. 174 (1926).

²Judges are specially protected by the constitutional provision that they "shall hold their offices during good behavior" (Art. IV, § 1); although in a

may retire every presidential appointee to private life at a stroke of the pen. He can be as capricious as he chooses to be." Not unnaturally, the decision stirred a good deal of speculation as to the consequences that might be expected. The view of the best students of the subject, however—and it has thus far been borne out by experience—was that matters would go on very much as in the past. The customary method of making removals had been by nominating successors whose confirmation by the Senate served at one stroke to meet the requirement that the Senate be consulted and to remove the incumbent. It was chiefly the fact that President Wilson departed from usage in the Myers case by nominating no successor that left the Senate unconsulted and prompted Myers to bring his suit. Hereafter, the president will be free to follow this course with impunity—so far as sheer legality is concerned. Normally, however, there must be a successor; that successor must be confirmed; and political expediency will dictate that the old procedure be adhered to. Presidents cannot afford to be guided by caprice, or to ruffle the feelings of senators unnecessarily. Full responsibility for removal is concentrated in the president, as it ought to be; but political expediency and public opinion may reasonably be depended upon to prevent abuses for which the constitution, as now interpreted, undeniably leaves the way open. This principle—never really doubted by any constitutional lawyer—received forceful illustration in February, 1924, when, by a vote of 47 to 34, the Senate called upon President Coolidge to ask for the resignation of the secretary of the navy, on the ground that the latter had been remiss in the performance of his official duties. Affirming that "the dismissal of an officer of the government, such as is involved in this case, other than by impeachment, is exclusively an executive function," the president explained in a public statement that no official recognition could be given the passage of the resolution; and legal opinion and popular sentiment alike strongly supported the position taken.

To the president's power to appoint and remove officials is added the equally important power of directing them in the performance of their duties. As exercised today, this power is the product of long and somewhat hazardous development. The idea of the makers of our national governmental system was that the

dictum accompanying the Myers decision Chief Justice Taft remarked that the questions relating to the removal of judges are different from those relating to the removal of executive officers, "and therefore we do not decide them."

control of executive and administrative work should be divided between the president and Congress; and when the first executive departments were established it was specified that the former should have power to direct two of them, *i.e.*, State and War, but that the head of the third, *i.e.*, the Treasury, should report directly to Congress. The earlier presidents used their directing power sparingly, and the courts viewed it as practically limited to the fields in which it was specifically conferred.

CHAP.
XVI

There is no denying that Congress exercises much control over the executive authorities today, and especially over the subordinate administrative system.¹ It is Congress that creates the executive departments and their more important subdivisions and determines what their functions shall be. It is Congress that says, in many situations, what shall be done and—in so far as it likes—how it shall be done. Congress alone can provide the requisite funds, and it can investigate, criticize, and suspend or permanently stop many, if not most, kinds of administrative activity, regardless of the wishes of the president and his advisers. Nevertheless, the president has gradually acquired a very substantial power of direction. Congress itself has helped to build up this power by passing large numbers of acts creating new governmental machinery and conferring on the president the direction of it.

Division
of control
over
adminis-
tration

But the power is one which must have developed on large lines in any case. To begin with, the power to remove involves the power to direct. This was clearly illustrated when President Jackson ordered the deposits of government funds in the United States Bank to be withdrawn, and dispensed with two secretaries of the treasury before obtaining one who would give the necessary order.² Armed with the power of removal, he could reiterate his command indefinitely until some one was found to carry it out. In the second place, however, the power of direction has a clear constitutional basis. The constitution makes it the duty of the president to "take care that the laws be faithfully executed,"³ and requires him, at his inauguration, to take oath that he will "faithfully execute" the office of president and preserve, protect, and defend the constitution. His foremost duty, indeed, is the execution of the laws—not only the acts of Congress, but treaties, decisions of the federal courts, and all obligations which can be inferred from the constitu-

Basis and
extent
of the
president's
power of
direction

¹ See p. 270.

² W. MacDonald, *Jacksonian Democracy*, Chap. XIII.

³ Art. II, § 3.

tion; and to this end he must be regarded as endowed with power to direct his subordinates in the executive service, even as he is authorized to use the armed forces if such a course becomes necessary. Acts which are required by law of heads of departments or other officers, *i.e.*, acts which are "ministerial" rather than political, are, indeed, theoretically beyond the president's power to control. In case of neglect, there are recognized judicial processes to compel performance of them. Nevertheless, even here the president may assert himself; he may threaten to remove an officer for performing an act required of him by Congress, thereby forcing upon him, at all events, the disagreeable choice between a legal prosecution and the loss of his position.

Closely related to the power of direction is the ordinance power. The nature and scope of the government's various activities are defined in acts of Congress, but the details of organization, the forms of procedure, and, in general, the *minutiae* of administration, are left to be determined by supplementary rules and regulations. Thus, an immigration law, in seeking to debar paupers and criminals from admission to the country, may prescribe rather fully the means and manner of its own enforcement; yet it will remain for the executive branch of the government to lay down many detailed regulations pertaining to the work of inspection, the handling of appeals from the decisions of the examining authorities, the detention of applicants refused admission, and similar matters. Most of this subordinate legislation emanates from the heads of departments or their inferiors. But a considerable amount comes from the president, who, in addition, is, of course, ultimately responsible for all ordinances issued in the departments.¹ The president himself promulgates the Consular Regulations, the Civil Service Rules, and the Army and Navy Regulations, together with rules for the patent office and the customs and internal revenue services. In some cases he acts upon express statutory authority; in others his authority is implied from the nature or tone of the law to be executed; in still others he proceeds under sole warrant of the constitution. The Army and Navy Regulations, for example, were long promulgated by virtue of the president's constitutional status as commander-in-chief, although nowadays they have also a statutory basis. The ordinance power is not as extensive in the United

¹ See p. 284. The extent and importance of this subordinate legislation are clearly brought out in J. A. Fairlie, "Administrative Legislation," *Mich. Law Rev.*, XVIII, 181-200 (Jan., 1920).

States as in Great Britain and other European countries. But it tends to expand as governmental functions become more numerous and complex; and under the stress of the World War it attained truly remarkable proportions.¹

CHAP.
XVI

The next two presidential powers of which we shall speak relate to activities over which the national government has exclusive jurisdiction and in which the president himself has easily the most prominent part. One is the conduct of foreign relations; the other is the carrying on of war. The president's rôle in the management of our relations with foreign states presents several phases. In the first place, he is the official medium of intercourse between our government and all foreign governments. He speaks for the country on ceremonial occasions and receives distinguished visitors to our shores; subject to the Senate's power of confirmation, he appoints all of our ambassadors and ministers to other countries, and all consuls stationed therein;² on his sole responsibility, he receives foreign ambassadors and other public ministers, and also, if necessary, dismisses them; through the State Department he carries on correspondence abroad, declaring policy, pressing claims, offering settlements, replying to all manner of inquiries and proposals.

3. Conduct
of foreign
relations:

(a) Main-
tenance of
intercourse

Out of this function of representing the nation in its dealings abroad grows a second very important power, *i.e.*, recognition. This means the power of determining what the official American attitude shall be toward an unsettled or altered political situation in other lands. An insurrection or civil war may have arisen, and the president may recognize the insurgency, or even the belliger-

(b) Recog-
nition

¹ For example, the Food and Fuel Control Act of 1917 authorized the president, among other things, to "fix the price of coal and coke and to establish rules for the regulation of their production, distribution, and storage;" and a measure in 1918, known as the Overman Act, went farther by authorizing him "to make such redistribution of functions among executive agencies as he may deem necessary . . . in such manner as in his judgment shall seem best fitted to carry out the purposes of this act." These were, of course, war measures whose operation ceased after hostilities were ended. W. F. Willoughby, *Government Organization in War Time and After*, Chap. 1. On the ordinance power see also p. 284 below. Cf. H. C. Black, *The Relation of the Executive Power to Legislation*, 116-148, and especially J. Hart, *The Ordinance-Making Power of the President of the United States* (Baltimore, 1925).

² Indeed, the president can employ special agents abroad without procuring senatorial consent at all. These agents are not officers of the United States, and they can be paid only out of the president's contingent fund, unless Congress makes special appropriation for them. But their services may be very important, as, for example, were those of Col. E. M. House as special emissary of President Wilson in Europe during the World War. See H. M. Wriston, "Presidential Special Agents in Diplomacy," *Amer. Polit. Sci. Rev.*, X, 481-499 (Aug., 1916).

ency, of the insurrectionists, thereby according them (so far as the United States is concerned) certain rights which they would not have as mere rebels.¹ An example is President Cleveland's recognition of a state of insurgency in Cuba in 1895. But he may go farther: by proclamation, or by sending or receiving a diplomatic representative, he may recognize the independence of an insurrectionary state, even at the risk of bringing on a war between the United States and the state which has been dismembered. Thus President Monroe recognized several of the revolutionary Latin American republics;² thus President Roosevelt, by receiving the emissary of the embryo republic of Panama in 1903, recognized Panama as an independent state and paved the way for the agreement under which the Panama Canal was built;³ thus also were Czechoslovakia and other new European states recognized in 1918 and 1919. Again, the president may determine which of two or more rival governments in a country he will have dealings with—to which, for example, he will accredit a diplomatic representative. He may, of course, withhold recognition altogether, and in that way may profoundly influence the course of events in the country concerned. The downfall of Huerta, in Mexico, in 1914, was directly caused by President Wilson's refusal to recognize him as the *de facto* chief executive. The constitution says nothing about recognition, and at various times it has been argued that Congress possesses the power concurrently with the president. International usage, however, indicates that it is strictly an executive function; as such, it is easily inferable from the power to appoint and receive envoys; and precedent, backed by judicial opinion, places it wholly in the president's hands, subject only to the power of the Senate to confirm diplomatic appointments.⁴

(c) Protec-
tion of
citizens
abroad

"Under our system of government," the courts have declared, "the citizen abroad is as much entitled to protection as the citizen

¹ A. S. Hershey, *Essentials of International Public Law and Organization* (New York, 1927), 201-207.

² Congress appropriated one hundred thousand dollars for diplomatic posts in Latin America, but admitted the president's right to determine what countries should be thus recognized. J. Q. Adams, *Memoirs*, IV, 205-206.

³ *Foreign Relations of the United States* (1903), 245.

⁴ E. S. Corwin, *The President's Control of Foreign Relations*, 71-83; J. M. Mathews, *American Foreign Relations: Conduct and Policies*, Chap. XVIII; W. L. Penfield, "The Recognition of a New State—Is it an Executive Function?" *Amer. Law Rev.*, XXXII, 390-408 (May-June, 1898); C. A. Berdahl, "The Power of Recognition," *Amer. Jour. Internat. Law*, XIV, 519-539 (Oct., 1920); J. Goebel, "The Recognition Policy of the United States," *Columbia Univ. Studies in Hist., Econ., and Public Law*, LXVI, No. 1 (1915).

at home;''¹ and it falls to the president, as chief executive and director of our foreign relations, to see that such protection is duly given. If an American sojourning in a foreign land or traveling on the high seas is maltreated and cannot obtain justice, the president, acting through a diplomatic representative, or even directly, may make demands in his behalf, and may go to any lengths short of a declaration of war to obtain redress for him. Similarly, it is the president's duty to extend protection to foreigners temporarily domiciled in the United States. This does not necessarily mean that he must do more in their behalf than execute the laws of Congress touching their rights—which, of course, he is bound to do in any case. But he may specially request the authorities of a state to be regardful of alien rights; he may instruct a district attorney to give legal aid; and in time of war he may enlighten both aliens and citizens by a proclamation of neutrality calling attention to rules of international law and to statutes forbidding various unneutral acts.

CHAP.
XVI

The most important of the president's powers in relation to foreign affairs have yet to be considered, namely, the making of treaties and the shaping of foreign policy. Until the work of the convention of 1787 was far advanced, treaty-making was expected to be assigned exclusively to the Senate. Eventually, however, the president was admitted to the leading rôle, for the reason—so Jay tells us in *The Federalist*—that "perfect secrecy and immediate dispatch are sometimes requisite."² Accordingly, the provision is that the president shall make treaties, "by and with the advice and consent of the Senate . . . provided two-thirds of the senators present concur."

(d) Treaty
making

The initiative lies entirely with the president. Either house of Congress, or the two houses concurrently, may by means of a resolution advise that a certain treaty be negotiated. But unless the president chooses to set the necessary machinery in motion nothing can be done. Conversely, he can start a negotiation regardless of the feeling in either branch of Congress concerning it, or even without any knowledge on the part of Congress; and he need make no disclosures regarding it until he is ready to do so. He may work through the regular diplomatic representative accredited to the foreign government concerned, or he may appoint a special plenipotentiary or commission; or again he may cause the negotia-

Presiden-
tial initia-
tive

¹ *Durand v. Hollins*, Fed. Cas. No. 4186 (1860).

² No. LXIV (Lodge's ed., 403). Cf. No. LXXV.

tion to be carried on at Washington through the secretary of state. When the treaty is completed, he, furthermore, has the full option of submitting it to the Senate, returning it to the negotiators for revision, or dropping it and ordering the negotiations discontinued. He may hold back the instrument because he considers it unsatisfactory, or because he recognizes that submission of it to the Senate would be useless. Jefferson, in 1806, sent back to Monroe and Pinckney a treaty which they had concluded with Great Britain, because he saw that it entirely failed to settle the real issues between the two countries.¹

Washington and Jackson consulted the Senate in advance about the terms of Indian treaties, and Polk, in 1846, similarly sought advice on a proposed convention with Great Britain for the settlement of the Oregon boundary. This practice, however, never established itself;² and although the president nowadays usually finds it expedient to consult with the members of the Senate committee on foreign relations when a negotiation is in progress, or even to appoint senators to be members of negotiating commissions,³ the Senate normally is given no opportunity to take action on a proposed treaty until the completed instrument is transmitted to it.

"A treaty entering the Senate," wrote John Hay after six years of experience as secretary of state, "is like a bull going into the arena; no one can say just how or when the final blow will fall—but one thing is certain—it will never leave the arena alive."⁴ This statement is much too strong, as is evidenced by the fact that in over a hundred years the Senate entirely withheld its consent from only seventeen in a total of about six hundred and fifty negotiated treaties.⁵ Every proposed treaty, however, has to run the gauntlet of senatorial scrutiny, and some treaties emerge triumphant only after a great parliamentary fight, in which all

The Senate's part in treaty-making

¹ E. Channing, *The Jeffersonian System*, 203-208.

² There are not more than a dozen instances of the sort since 1830. See J. W. Foster, *The Practice of Diplomacy*, 269-273.

³ Three of the five commissioners appointed by President McKinley to negotiate a treaty of peace with Spain in 1898 were senators, one of them being chairman of the foreign relations committee; and two of the four commissioners who signed, on behalf of the United States, the treaty concluded with Great Britain, France, and Japan at the Washington conference on the limitation of armaments in 1921-22 were senators, one of them again being the chairman of the foreign relations committee. President Wilson was much criticized because he did not include one or two senators in the commission which represented the United States in negotiating the treaty of Versailles in 1919.

⁴ W. R. Thayer, *Life and Letters of John Hay*, II, 393.

⁵ S. B. Crandall, *Treaties, their Making and Enforcement*, 82.

possible favoring influence is brought to bear from the White House. Ordinarily, treaties are considered in secret executive session, although some, *e.g.*, the Taft arbitration treaties of 1912, have been debated with open doors. In seventy or eighty instances, beginning with the Jay treaty in 1794, the Senate's consent to ratification has been qualified by reservations, amendments, and interpretations. These are tantamount to a change of the treaty, and if either the president or the foreign government is unwilling to accept such a modification the treaty fails. A number of arbitration treaties were killed in this way in 1904, and again in 1911. At any time while a treaty is pending in the Senate the president can recall it, whether because circumstances have so changed that he no longer favors it or because he perceives that it is doomed to failure. Even after the Senate has given its consent a treaty may be held up. It remains for the president to ratify it and, upon being apprised of ratification by the other government, to promulgate it; and he may refuse to take these final necessary steps, although naturally he will do so only under very unusual circumstances.¹

CHAP.
XVI

Once promulgated, a treaty becomes part of the law of the land, enforceable like any other portion of that law. Not all treaties, however, are, or are intended to be, permanent; and, while they may be abrogated, wholly or in part, by acts of Congress, it commonly falls to the president to take the necessary steps to bring about a termination of them. Normally, this will mean the negotiation of a substitute treaty. But it may take the form of a simple denunciation of an existing treaty by the president and Senate, or by the president alone. President Taft, in 1911, terminated a long-standing treaty with Russia by independent denunciation.

Abrogation
of treaties

Treaties can become operative only with the advice and consent of the Senate. But not every understanding entered into with a foreign government takes the form of a treaty. Many are, instead, simple executive agreements. In some cases, *e.g.*, postal conventions, these agreements rest upon a statutory basis. But the majority of them are concluded by the president, directly or

Executive
agreements

¹ Some treaties require appropriations of money for their enforcement, and the House of Representatives has accordingly at times set up a claim to participation in the treaty-making power. In his message on the Jay treaty in 1796 Washington, however, urged that after a treaty has been duly ratified Congress is morally obligated to take whatever action is necessary for its enforcement; and this view has commonly prevailed, so that in the whole business of treaty-making the president has the first word and also the last. J. M. Mathews, *Conduct of American Foreign Relations*, 201-206.

through agents, on his sole authority; and the limits to which he can go are determined by nothing more tangible than precedent. Many agreements deal with minor matters which, by general admission, do not call for a treaty; for example, pecuniary claims of American citizens against foreign governments. But others relate to affairs of prime importance. Thus the arrangement with Great Britain in 1817 for the limitation of naval forces on the Great Lakes has always been in form only an executive agreement, even though at one time given the Senate's assent. The Boxer indemnity agreement of 1901, the Lansing-Ishii agreement of 1917, and the armistice with Germany in 1918 are other illustrations.

Indeed, an executive agreement may become frankly a means of evading—temporarily, at all events—the necessity of securing a treaty. In 1905 President Roosevelt worked out a treaty with Santo Domingo stipulating that the United States should guarantee the integrity of that republic and should take over the administration of the customs with a view to settling foreign claims and warding off European intervention. The Senate refused to consent to the treaty; whereupon the president entered into a *modus vivendi* with the Santo Domingan government on exactly the lines desired, and for two years the protectorate was maintained on this sole basis.¹ In 1907 a treaty regularizing the arrangement was at last carried through. President Taft, in 1911, entered into a similar agreement with Nicaragua, which was superseded by a treaty only in 1916. So far as content goes, there is therefore no clear line of demarcation between executive agreements and treaties. There is a presumption that executive agreements which deal with large matters are preliminary to treaties. But this is not necessarily true; and, outside of the constitutional restriction that they cannot provide for outlays of money not authorized by Congress, and the practical restriction arising from disinclination to incur senatorial or popular displeasure, there is really no limit to the extent to which the agreement-making power may be stretched.

More than any one else, the president determines the nation's foreign policy. When a foreign complication arises, or a new international problem presents itself, he has the first opportunity to say what the attitude of this country will be; and by the stand which he takes he can so put the country on record as to make it next to impossible for Congress, or even a succeeding president, to

(e) Determination of foreign policy

¹ *Foreign Relations of U. S.* (1905), 334-343; T. Roosevelt, *Autobiography*, 551-552.

assume a different position. Washington, by his proclamation of neutrality in 1793, practically determined once for all that the United States would hold aloof from the deadly struggle that had broken out between Great Britain and France. Monroe, in 1823, promulgated a set of principles concerning foreign political activities in the western hemisphere which, under the name of the Monroe Doctrine, broadened out into perhaps the most continuous and important of all our foreign policies. McKinley, through his secretary of state, John Hay, irrevocably committed the country, in 1900, to the "open door" in China. Roosevelt, Taft, and Wilson brought successive Caribbean republics under United States supervision and, for better or for worse, left us a fairly definite policy of maintaining Latin American protectorates. In all such matters the president must sooner or later have the backing of Congress and of public opinion; and it must be recalled that not only was Adams balked in his Pan-American policy, Pierce in his Cuban policy, Grant in his Santo Domingan policy, and Cleveland in his Hawaiian policy, but the war of 1812 and the intervention in Cuba in 1898 were forced upon reluctant presidents by zealous Congresses. None the less, speaking broadly, executive leadership has made the story of our foreign relations, both positively and negatively, what it is. The president has unrestricted power of initiative; he can go far by his own authority; and it is usually found impossible to retrace the steps that he has taken. He may even lead the country into war; for, although he cannot declare war, he can adopt an attitude or create a situation that will make war unavoidable.

This raises the general question of the president's war powers. By the terms of the constitution, he is commander-in-chief of the army and navy, and also of the militia of the several states when it is called into federal service. This alone would give him great military authority. But, in addition, he is required to see that the laws are faithfully executed, which may at any time entail the use of force; and it falls to him to act when it becomes necessary for the United States to discharge its constitutional obligation to protect the states against invasion or (on call) against domestic violence. Congress, it is true, shares generously in the war power. It creates the army and navy, fixes their size, determines the conditions of service, regulates the pay of officers and men, and votes all appropriations for equipment and maintenance. It makes rules for the regulation of both land and naval forces; and

it alone can declare war. The president's actual control is, however, not seriously impaired by this division of authority. He appoints all the regular and reserve officers of the army and navy.¹ He supplements the general rules of Congress with detailed regulations. He has full power of direction over the War and Navy departments, in which the money voted by Congress is spent. Limited only by the funds at his disposal, he can send both land and naval forces anywhere that he chooses, in this country or abroad, in time of war or in time of peace. He can wield as much authority as he likes in the planning and execution of campaigns, and there is nothing to prevent him from taking the field in person if he desires to do so. He can establish military governments in conquered territory and directly, or through his appointed agents, exercise all executive power there, and all legislative power as well, until Congress makes other arrangements.² In short, Congress provides the money and the men; the president uses them, largely at his own discretion.

The
president
and the
beginning
of war

Congress alone can declare war. But it is to be observed, first, that in the case of a civil war no declaration is necessary, and second, that, as has been said, the president may, by his own acts, make war inevitable. As commander-in-chief, President Polk, in 1846, ordered American troops to advance into territory which was in dispute with Mexico. The Mexican authorities had made it plain that such a step would be regarded as an act of war, and the soldiers were promptly fired upon. Polk then said that war existed by act of Mexico, and Congress proceeded to a formal declaration. President McKinley ordered the battleship *Maine* to Havana harbor in 1898, notwithstanding that the Spaniards were certain to regard the act as distinctly unfriendly. The vessel was blown up, and the Spanish-American war ensued. War with Great Britain was narrowly averted in 1895 when President Cleveland, in a message to Congress, took a bold stand against the course of that power in the Venezuelan controversy. Had Colombia been a stronger state, war might well have been brought upon the United States by President Roosevelt's recognition of the republic of Panama in 1903. There will always be difference of opinion as to whether we were or were not at war with Mexico on the occasion

¹ The officers of the militia, except when it is in the service of the United States, are appointed as the several states direct. See p. 317.

² D. Y. Thomas, "History of Military Government in the Newly Acquired Territory of the United States," *Columbia Univ. Studies in Hist., Econ., and Public Law*, XX, No. 2 (1904).

of Admiral Mayo's capture of Vera Cruz by sole order of President Wilson in 1913,¹ and with Russia when—again on the president's sole authority—American troops coöperated in military expeditions against the Bolsheviks *via* Archangel and Vladivostok in 1918. But whatever may be the conclusion upon these points, there can be no doubt at all that by his handling of relations with Germany after the sinking of the *Lusitania* in 1915, President Wilson created a situation in which the only alternative to a declaration of war upon the German imperial government was national stultification.²

The president is commander-in-chief in time of peace no less than in time of war.³ The constitution does not define his functions in this capacity under either condition, nor has any court attempted to do so; but usage has made them fairly clear. In peace times he appoints officers, makes regulations, and, in general, sees that the armed forces are so maintained as to be in readiness for quick and effective use. There is comparatively little to be done outside of ordinary administration. But in war times the situation is wholly different; the power of command then expands almost without limit, finding applications that would never be tolerated, or even thought of, save in a national emergency. The object in war is to break down the enemy's power of resistance as speedily as possible, and it becomes the president's supreme duty to take such measures as will accomplish this, and such others as will, meanwhile, conserve and enhance the nation's capacity for resistance. He may not, of course, violate the constitution or the laws; and, to a degree, he must work in coöperation with Congress. But, outside of these limitations, he and his advisers, civil and military, have a free hand.

Naturally, the president's war powers rose to their greatest heights during the Civil War and the more recent World War. Lincoln, in addition to the active direction of operations on land and sea, authorized searches and arrests without warrants, caused newspapers to be suppressed, declared martial law in regions where the regular courts were open, suspended the writ of habeas corpus,

CHAP.
XVI

Military
powers in
peace-time
and in
war-time

¹ F. A. Ogg, *National Progress*, 293-296. See S. E. Baldwin, "The Share of the President of the United States in a Declaration of War," *Amer. Jour. Internat. Law*, XII, 1-14 (Jan., 1918).

² Over against this power of the president to "rush" Congress and the country into war must, however, be set his power to veto a declaration of war; although this power has never been, and is not likely to be, exercised.

³ This has been questioned in Congress, but the contrary view has never established itself. See P. S. Reinsch, *Readings on American Federal Government*, 22-32.

and in other ways sought to suppress opposition to the policies of the government from persons in the North who sympathized with the southern states. With a view, also, to lessening the South's power of resistance, he issued the famous proclamation of 1863 liberating the slaves in the enemy states. Most of his acts were subsequently sanctioned by Congress and the courts, but they were originally performed on his sole responsibility; and a few were later pronounced unconstitutional.¹ During the World War, President Wilson, also, wielded tremendous power. To a far greater extent than Lincoln, he obtained from Congress, in advance, grants of authority which he considered necessary for the successful prosecution of the war. The powers with which he was thus endowed, however—*e.g.*, in the draft act of 1917, the food and fuel conservation act of the same year, and the Overman act of 1918—transcended, in numerous directions, those which Lincoln wielded.

Forcible
execution
of the laws

The constitution requires the president to see that the laws are faithfully executed; his oath of office pledges him to protect and defend the constitution; and the general nature of his position makes it his duty to guard all federal instrumentalities and property. To these various ends, he may, if necessary, make full use of the army and navy, and likewise of the militia of the states when called, according to act of Congress, into federal service. Congress has passed numerous measures authorizing the use of both the national and state forces for these purposes.² But—so far as the army and navy, at all events, are concerned—the president would have the power in any case. "The entire strength of the nation," the Supreme Court has said, "may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the constitution to its care. . . . If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws."³

¹ For example, the setting up of military courts for the trial of civilians in regions where the civil courts were open. *Ex parte Milligan*, 4 Wallace, 2 (1866). Cf. W. A. Dunning, *Essays on Civil War and Reconstruction* (New York, 1904); J. G. Randall, *Constitutional Problems under Lincoln* (New York, 1926), *passim*.

² The series began with (1) the militia act of 1795 which authorized the president to call forth the militia whenever the execution of the federal laws was obstructed by combinations too powerful to be suppressed through the ordinary course of judicial proceedings, and (2) an act of 1807 which authorized the use of the army and navy under similar circumstances.

³ *In re Debs*, 158 U. S., 564 (1895).

The constitution also stipulates that the United States shall guarantee to every state a republican form of government and shall protect the states against both invasion and domestic violence. If the republican form of government in a state is threatened or an invasion is undertaken, the president acts without awaiting a request from the state authorities. If, however, the situation involves simply domestic disorder, he cannot act until he is asked to do so, unless the execution of national law or the safety of national property is imperiled; in this contingency he may intervene independently, as did President Cleveland when, in 1894, the carrying of the mails and the flow of interstate commerce were obstructed by a great railway strike at Chicago.¹ A request for national assistance in repressing domestic violence is made by the legislature of the state if it is in session, otherwise by the governor. The president is not bound to comply; indeed he is not likely to do so unless, after investigation, he feels that the authorities of the state have reached the limit of their capacity to handle the situation. When first asked to aid West Virginia in curbing disorders produced in that state by protracted strikes of bituminous coal miners in 1921, President Harding demurred, although subsequent developments led him to take the desired action.

CHAP.
XVI
—
Suppression of
domestic
disorder

Finally may be mentioned the president's power, as chief executive, to grant pardons and reprieves. The Supreme Court has said that the effect of a full pardon is to make the offender, in the eye of the law, "as innocent as if he had never committed the offense,"² a reprieve is, of course, only a suspension of the execution of a sentence. In wielding this power the president acts under two express constitutional limitations: he cannot pardon a person who has been convicted on impeachment and thus restore him to office; and he can grant a pardon only where the offense has been against the authority of the United States and not that of a state. It was formerly considered that he could not pardon a person sentenced

5. Pardon
and
reprieve

¹ Governor Altgeld protested against the use of national troops in the state until he or the legislature requested it. But the president stood firmly on his right and duty to execute the national laws with all the forces at his command, and his position was sustained by the unanimous judgment of the Supreme Court in the Debs case previously cited. See Cleveland's own account of the affair in his *Presidential Problems* (New York, 1904), Chap. II. Cf. W. R. Browne, *Altgeld of Illinois* (New York, 1924), Chaps. XII-XVI. Some of the documents are printed in F. G. Crawford, *Readings in American Government* (New York, 1927), 133-139.

² It does not have the effect, however, of restoring property that has been forfeited or office that has been vacated. W. W. Willoughby, *Constitutional Law of the United States*, II, 1171.

to imprisonment for contempt by a federal court.¹ But in the case of Philip Grossman, who was pardoned by President Coolidge of criminal contempt of a federal district court, the Supreme Court unanimously sustained the president in a decision handed down on March 2, 1925.² Outside of the restrictions mentioned, the pardoning power is very ample. It may, indeed, be used in behalf of a stipulated class of persons, rather than individuals specifically named, and thus give rise to what is called an amnesty. And although Congress can itself pass acts of amnesty,³ that body cannot in any way, by legislation, curtail the president's right to grant pardons at his own discretion. Pardons, furthermore, may be full and unconditional, or they may be restricted in any manner that the president chooses.⁴ Few of his powers bring a president more perplexities than does this one. He is provided by the Department of Justice with full information, and with opinions, on each case that comes up. But he alone makes the decision, and in doing it he must be prepared, in the interest of the public well-being, to withstand touching appeals and powerful influences.⁵

REFERENCES

The Federalist, Nos. LXIV, LXXIV-LXXVII.

J. H. Finley and J. F. Sanderson, *The American Executive and Executive Methods* (New York, 1903), Chaps. xv, xviii-xix.

J. A. Fairlie, *National Administration in the United States* (New York, 1905), Chaps. i-ii.

L. M. Short, *The Development of National Administrative Organization in the United States* (Baltimore, 1923), Chap. xxii.

J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chap. vi.

W. H. Taft, *Our Chief Magistrate and his Powers* (New York, 1916), Chaps. iii-v.

E. S. Corwin, *The President's Control of Foreign Relations* (Princeton, 1917), Chaps. i-iii.

———, *The President's Removal Power Under the Constitution* (New York, 1927).

¹ W. W. Willoughby, *op. cit.*, II, 1270. Cf. W. H. Taft, *Our Chief Magistrate and his Powers*, 120-121.

² *Ex parte Grossman*, 267 U. S., 87. See *Amer. Polit. Sci. Rev.*, XX, 85-87 (Feb., 1926).

³ *Brown v. Walker*, 161 U. S., 591 (1896).

⁴ A person serving a sentence in a federal prison may also be paroled, without pardon; or his sentence may be commuted.

⁵ W. H. Taft, *Our Chief Magistrate and his Powers*, 118-124. A notable illustration is the pardon of Eugene V. Debs by President Harding in December, 1921.

- J. M. Mathews, *American Foreign Relations: Conduct and Policies* (New York, 1928), Chaps. XVIII-XXVIII. CHAP.
XVI
- Q. Wright, *The Control of American Foreign Relations* (New York, 1922), Chaps. XIV-XVI.
- L. Rogers, *The American Senate* (New York, 1926), Chap. III.
- W. W. Willoughby, *Constitutional Law of the United States* (New York, 1910), I, Chaps. XXXII-XXXV; II, Chaps. LIX-LXII.
- J. W. Foster, *The Practice of Diplomacy* (Boston, 1916), Chaps. III-IV, XII-XVI.
- S. B. Crandall, "Treaties, their Making and Enforcement," *Columbia Univ. Studies in Hist., Econ., and Public Law*, XXI, No. 1 (2nd ed., New York, 1916).
- J. W. Davis, *The Treaty-Making Power in the United States* (Oxford, 1920).
- R. Hayden, *The Senate and Treaties, 1789-1817* (New York, 1920).
- C. C. Tansill, "The Treaty-Making Powers of the Senate," *Amer. Jour. of Internat. Law*, XVIII, 459-481 (July, 1924).
- G. W. Wickersham, "The Senate and Our Foreign Relations," *For. Aff.*, II, 177-192 (Dec., 1923).
- E. M. Borchard, *Diplomatic Protection of Citizens Abroad* (New York, 1915).
- G. Sutherland, *Constitutional Power and World Affairs* (New York, 1919).
- J. F. Barrett, "International Agreements without the Advice and Consent of the Senate," *Yale Law Jour.*, XV, 63-82 (Nov., 1905).
- C. A. Berdahl, "War Powers of the Executive in the United States," *Univ. of Ill. Studies in the Social Sciences*, IX, Nos. 1-2 (Urbana, 1921).
- J. G. Randall, *Constitutional Problems Under Lincoln* (New York, 1926), Chaps. II, VI-IX, XVI-XVII, XIX-XX.
- C. E. Hughes, "War Powers under the Constitution," 65th Cong., 1st Sess., Sen. Doc. No. 105 (1917).
- W. Whiting, *War Powers under the Constitution of the United States* (Boston, 1871).
- C. R. Fish, *The Civil Service and the Patronage* (New York, 1905).
- L. M. Salmon, "History of the Appointing Power of the President," *Amer. Hist. Assoc. Papers*, I, No. 5 (Washington, 1886).
- J. Hart, *The Ordinance-Making Powers of the President of the United States* (Baltimore, 1925).
- The Constitution of the United States of America as Amended to December 1, 1924* (68th Cong., 1st Sess., Sen. Doc. No. 154), 377-402.

CHAPTER XVII

THE PRESIDENT AND CONGRESS

The president more than a chief executive

A reading of the constitution will certainly convey the impression that the president is chiefly important as an executive. "The executive power" is expressly vested in him;¹ on the other hand, "all legislative power" is vested in Congress.² The constitution's framers, however, although strongly attached to the doctrine of separation of powers, believed likewise in checks and balances: and in pursuance of this idea they set over against certain arrangements for control of executive work by Congress certain other provisions for association of the president with Congress in the processes of law-making. The prime function of the president was to be executive; but he was also to have to do with legislation. In particular, he was (1) to convene, and, under certain circumstances to adjourn, the two houses;³ (2) to furnish Congress with "information of the state of the Union and recommend to their consideration such measures as he shall judge necessary and expedient,"⁴ and (3) to receive all bills, orders, resolutions, or votes passed by Congress and to approve or disapprove them.⁵

Tendency of legislative to overshadow executive functions

What would happen may or may not have been foreseen by authors of the plan. But in any event it was not long until the two rôles assigned to the president began to look very different in practice from the way they looked on paper. The executive function never ceased to be important: viewed as chief executive only, the president today is an imposing and powerful figure. But the really vital work in government is the shaping and control of policy, not the mere carrying out of decisions after they have been reached; and policy-framing is of the essence of legislation. Accordingly, the presidents almost from the first found their richest satisfaction and reward in the part they were able to bear in initiating, encouraging, and otherwise influencing the making of laws—on finance, on commerce, on defense, and what not. And the lengths to which they might have been induced to go in this

¹ Art. II, § 1, cl. 1.

² Art. I, § 1.

³ Art. II, § 3.

⁴ *Ibid.*

⁵ Art. I, § 7, cl. 2-3.

direction by personal inclination were vastly exceeded by those to which they, in the course of time, were driven by the unforeseen rise of party politics. Elected as party leaders, on platforms embodying programs of legislation, and increasingly held responsible by the people for what happened, they could hardly fail to slip more and more out of the character of chief executive into that of chief legislator. Without, of course, having ceased to be the former, presidents have in our own day become quite clearly also the latter.

CHAP.
XVII

“Nor,” remarks a recent writer, “is there cause for wonderment in this. It is simply a fact that the policies of government that enlist popular interest are mainly legislative policies. Executive policies are of small moment. Even the effect of administrative scandals is fleeting. Our presidential campaigns, to the extent that they are conducted upon any clear-cut issues of policy, are fought out normally upon the record of legislative achievements of the administration in power and proposals for constructive legislation ahead. We elect the president as a leader of legislation. We hold him accountable for what he succeeds in getting Congress to do and in preventing Congress from doing. Once in office, except for considerations of the patronage, which is politics rather than executive business, the time and thought of the president and his cabinet are devoted far more largely to legislative than to executive matters. This is true even when Congress is not in session.”¹ Some presidents, to be sure, have sought to keep hands off legislative work. But, as the writer already quoted observes, “no president who has, for whatever cause, attempted to self-abnegate himself as leader in the legislative program of Congress and to immolate himself upon the altar of executive duty has been aught but relatively ineffectual.”²

Reasons

Very necessary is it, therefore, to take careful account of the president as part of the legislative system; and not merely of the more or less formal legislative duties placed upon him by the constitution, but of the extra-constitutional relationships and procedures by which his high rôle in the legislative domain was secured and is sustained.

By constitutional provision a Congress lasts two years and has one regular session each year, beginning the first Monday in December. Hence there is no power of dissolution, such as exists

Control
over ses-
sions of
Congress

¹ H. L. McBain, *The Living Constitution*, 116.

² *Ibid.*

in cabinet-governed countries, and the president has no absolute control over the date and length of regular sessions, except that he may adjourn the houses if they find themselves unable to agree on a time of adjournment.¹ Practically, however, he may wield a good deal of influence upon the length of sessions whose termination is not fixed by constitutional provision, doing this either by pressing for legislation that will tend to hold the houses in session or, conversely, by withholding or withdrawing proposals that would have had that effect. Furthermore, he may, at his discretion, convene the houses, or either of them, in special session; and this is rather frequently done, particularly when a new president has taken office and is reluctant to wait nine months before getting the Administration's legislative program under way. Thus President Taft in 1909, President Wilson in 1913, and President Harding in 1921 called a special session beginning shortly after inauguration day.

The requirement that the president shall give Congress information on "the state of the Union" and recommend to its consideration "such measures as he shall judge necessary and expedient"² is entirely logical. His duties enable him to know many things about both foreign and domestic affairs that are beyond the ken of the members of the legislative branch; he can point out defects and needs, and can suggest remedies in line with actual executive experience; and he is no less under obligation than is Congress itself to put information and ideas at the country's service. How frequently he shall communicate with Congress, at what times, at what length, and in what way, the constitution does not specify; accordingly each president exercises full discretion in these matters. It long ago became customary, however, to transmit at the opening of each congressional session a comprehensive message summarizing the state of public affairs, calling attention to matters requiring early consideration, and perhaps indicating specific measures which, in the president's judgment, ought to be adopted. In addition, shorter special messages, usually dealing with a single subject, are sent in as the occasion demands or the president desires. Washington and John Adams appeared in person before the two houses in joint session and delivered their messages orally. Jefferson, however, sent in his messages in writing:

¹ This power has never been exercised, although President Wilson was appealed to on one occasion to make use of it.

² Art. II, § 3.

and this practice prevailed until 1913, when the oral form was revived by President Wilson. Oral messages were employed by President Harding; and, with the aid of the radio, President Coolidge read his earlier messages to both Congress and the country. Since December, 1924, however, messages have again been transmitted in writing. The oral message has some advantages: it is likely to be more concise than the written message, which, in point of fact, has often been diffuse and uninteresting; it gives the president a chance to make his personality felt; and, even though but momentarily, it brings the executive and legislative branches into a closeness of touch which is too often lacking under a presidential form of government. On the other hand, the oral message may solidify opposition and precipitate conflicts which a written communication would hardly arouse.

How influential presidential messages are is a matter upon which it is difficult to generalize. Congress is under no obligation beyond giving a respectful hearing; it may take action directly opposed to the recommendations made, or it may refuse to act at all. Much depends, of course, upon whether the president's party is in control of both houses. But even if it is, there is no guarantee that his advice will be followed. Sometimes, it may be added, a message is really aimed at the country, or even at the world at large, rather than at Congress. The president may desire to rouse public feeling on a given subject, with or without a view to legislation, and may use the congressional message as a means to that end. President Roosevelt did this repeatedly. Or he may want to make his attitude known to a foreign state or group of states without incurring the embarrassments that might flow from resort to the customary diplomatic channels; as, for example, when Monroe, in 1823, served notice upon Europe of the principles which we have since known as the Monroe Doctrine, or when Cleveland, in 1895, told Great Britain, through the indirect and unexceptionable means of a message to Congress, that war would follow any attempt by that power to extend its sovereignty over territory which an investigating commission, then about to be set up, should award to Venezuela.¹ In numerous oral messages during the World War President Wilson summed up and unified the thought of the country on submarine warfare and other subjects; in the message of January 2, 1918, he set forth, practically on behalf of the Allied and Associated Powers, and in the form of the famous "fourteen

CHAP.
XVIIThe effects
of mes-
sages

¹ D. R. Dewey, *National Problems* (New York, 1907), 307-308.

points," the basis on which a restoration of peace would be possible.

Another way in which the president wields influence—in this case, positive control—over legislation is the exercise of the veto power. We have seen that the absolute veto as used by the colonial governors was exceedingly unpopular, and that most of the Revolutionary constitutions gave the new state governors no veto power whatever. The makers of the national constitution had in mind, however, a balanced government in which each branch should be prevented from intruding upon the rights or absorbing the power of the other branches; and the most practicable means of defense for the executive against encroachments by the legislature, *i.e.*, Congress, seemed to be the power of veto. Furthermore, as Hamilton urged in *The Federalist*, the veto would "furnish an additional security against the enactment of improper laws."¹ Accordingly, the constitution requires that every bill which shall have passed the two houses of Congress shall, before it becomes a law, be presented to the president, who, if he approves, shall sign it, and if he disapproves, shall return it, with his objections, to the house in which it originated, and it shall then become law only if both houses, by a two-thirds majority, again pass it.² The veto is not, therefore, absolute. It makes necessary a reconsideration of the bill; it gives the president an opportunity to present a formal argument against the measure; and it makes a second passage more difficult than the first. But it does not kill a bill which has a sufficient amount of legislative support.

Courses
open to the
president
when a bill
is pre-
sented to
him

When a bill is passed by the two houses and presented to the president, any one of four things may happen. The president may promptly sign it, whereupon it becomes law. Or, he may hold it without taking any action, in which case it becomes law at the expiration of ten days (Sundays excepted), without his signature, provided Congress is still in session. He may take this course because he disapproves of the measure and is unwilling to put his name to it, although recognizing that a veto would be useless or politically inexpedient; or because he is undecided about its constitutionality or general merit—as was President Cleveland on the income tax law of 1894—and prefers not to commit himself. Third, he may retain the measure and by so doing kill it, if Congress expires before the bill has been in his hands ten days. This pro-

¹ No. LXXIII (Lodge's ed., 458).

² Art. I, § 7.

cedure is known as the "pocket veto," and from the president's point of view it may be preferable to a direct veto because of obviating the necessity of making a formal explanation to Congress. Many bills are killed in this way, particularly by reason of the fact that large numbers of measures are rushed through Congress in the closing days of a session and require only to be "pocketed" by the president to be kept off the statute book. Formerly it was considered that no bill might be signed after Congress had adjourned. Monroe once proposed to sign in this way a measure that had been overlooked, but was advised by his cabinet not to do so, and although Lincoln actually signed one such bill, the Senate objected and a new bill of substantially the same purport was passed and approved in regular form. Practice, wrote ex-President Taft in 1916, makes it clear that bills may not be signed under these circumstances.¹ Within a ten-day period following the close of the second session of the Sixty-sixth Congress in June, 1920, President Wilson, however, signed eight bills, which thereupon became statutes equally with the fifty-one measures signed on the closing day of the session. A statement given out at the time showed that the attorney-general had held, in a formal opinion, that "the adjournment of Congress does not deprive him [the president] of the ten days allowed by the constitution for the consideration of a measure, but only, in case of disapproval, of the opportunity to return the measure with his reasons to the house in which it originated."² This new and sensible view has now definitely established itself, with the result that presidents nowadays are able—as are the governors in most of the states—to act with some real deliberation on measures passed amidst the hurly-burly usually accompanying the close of a legislative session.

CHAP.
XVIIPocket
veto

Finally, a bill may be vetoed outright. A pocket veto amounts to an absolute veto, because Congress has no opportunity to reconsider the measure. But a direct veto can be overcome by a two-thirds vote of both houses; if this is done, the bill becomes law notwithstanding the president's opposition. Proposed constitutional amendments, it should be noted, do not require the president's signature, and hence cannot be vetoed. "Joint resolutions," which differ from bills only in a technical way, have, when passed, the

Direct
veto

¹ *Our Chief Magistrate and his Powers*, 23-24.

² This somewhat contentious matter is discussed in L. Rogers, "The Power of the President to Sign Bills after Congress has Adjourned," *Yale Law Jour.*, XXX, 1-22 (Nov., 1920).

force of law, and therefore are subject to veto. But "concurrent resolutions," being mere expressions of congressional opinion, have no legal effect and do not have to be presented to the president. The rules of each house, not being embodied in bills, are likewise exempt.

Hamilton, in the essay quoted above, expressed the opinion that the veto would "generally be employed with great caution" and that there would be more danger of the president's "not using his power when necessary than of his using it too often or too much." On the whole, this estimate has been borne out. Not until Andrew Johnson's administration did any president find it necessary to use the veto in defense of his own constitutional rights, and there were fewer than fifty vetoes, all told, before the Civil War. The first six presidents vetoed bills only on the ground that they were unconstitutional or technically defective. Jackson, who in sundry ways made the presidency something different from what it had been before, gave the veto a new meaning by using it to defeat measures admitted to be constitutional and technically correct, but considered objectionable in their aim and content.¹ Yet Jackson, in eight years, vetoed only nine bills. In the turbulent era of Reconstruction, the veto was employed more freely, and recent presidents have not taken the conservative attitude of their earlier predecessors. Grant vetoed forty-seven bills, Harrison seventeen, Roosevelt forty, Taft thirty, Wilson twenty-six, and Cleveland three hundred and fifty-eight, chiefly private pension bills. Of seven presidents who made no use of the veto power at all, the most recent was Garfield.

The most significant thing is not, however, this increase of the number of vetoes; in proportion to the whole number of bills presented to the president, there are probably no more vetoes nowadays than seventy-five years ago. The really important matter is the freedom with which the presidents, as one writer has stated it, "offset their own judgment against that of Congress, not merely on great questions involving the public welfare, and on disputed

¹ He also claimed and exercised the right to veto bills which he regarded as unconstitutional, regardless of the judgment of the Supreme Court to the contrary. The best illustration is the veto, in 1832, of the bill to renew the charter of the United States Bank. There can be no doubt that in his broader interpretation and use of the veto power Jackson was entirely within his rights. The constitution simply says that if the president "approve" a bill he shall sign it and if not he shall return it. "No better word could be found in the language to embrace the idea of passing on the merits of the bill." W. H. Taft, *Our Chief Magistrate and his Powers*, 16.

constitutional questions, but on trivial matters whereon their means of information are not greater or better than those at the command of Congress, and whereon their individual judgment does not appear to be superior to that of the average congressman or senator."¹ In other words, the veto power has been so expanded in use as to become a general revisory power, applicable to all legislation, whether important or not, and whether relating to public matters or to private and personal interests. The result has been to make the president a far more active and potent factor in legislation than he originally was or was intended to be.

This does not mean, however, that the veto power has, in these later days, been employed loosely and irresponsibly. On the contrary, it has commonly been used reluctantly and with all due discretion. Most vetoes have been supported by public sentiment, and very few have been overridden by subsequent action of Congress. Not until Tyler's administration did any bill disapproved by the president afterwards receive the two-thirds vote in both houses necessary to make it law. Pierce was reversed five times, and Johnson fifteen, but Grant only four times, Hayes and Arthur once each, Cleveland, Taft, and Wilson twice each, Harding not at all, and Coolidge (to April, 1928) once.² In practice, therefore, the veto power tends to become absolute; only rarely and with great difficulty can a sufficient vote be mustered in the two houses to override an adverse presidential decision. This has led on several occasions to the suggestion that the veto power be weakened by allowing a vetoed measure to be repassed by both houses by a simple majority rather than the present two-thirds; and in 1842 Clay proposed a constitutional amendment to this effect.³ On the other hand, it has been suggested that the veto be strengthened by requiring that a bill, in order to be carried over a veto, shall be repassed by an affirmative vote of two-thirds of the entire member-

CHAP.
XVIIFew
vetoes
overridden
by Con-
gress

¹ E. Stanwood, *History of the Presidency from 1897 to 1909*, p. 233. For example, President Cleveland once vetoed a resolution providing for the printing of additional copies of a certain map of the United States, on the ground that a better map would soon be available.

² E. C. Mason, *The Veto Power*, Appendix D.

³ During the Jackson and Tyler administrations the Whigs were continually baffled by the vetoes of a hostile president and by the fact that, while they could carry their measures through Congress by simple majority, they could not muster the two-thirds majority necessary to override a veto. Clay's proposed amendment arose out of this experience. It may be added that in eight states a veto by the governor can be overcome by a simple majority in the two houses of the legislature.

ship of both houses, rather than, as now, two-thirds of a quorum in each.¹

Another, and decidedly more important, proposal looking to the strengthening of the veto power is that authority be conferred to veto single items of an appropriation bill while yet approving the measure as a whole. As matters stand, when an army bill, a rivers and harbors bill, or any other great appropriation measure, is laid before the president, he can only approve or veto the bill in its entirety. Among its scores, and even hundreds, of items he may find several to which he takes exception; they may involve, in his judgment, unjustifiable expenditure or sheer waste. To veto the entire measure would, however, produce friction and perhaps seriously impede the operation of some branch of the government; and, rather than raise these difficulties, the president is almost certain to return the bill to Congress with his endorsement. In this way the interests of public economy frequently suffer. All but ten of the states have met a similar situation by empowering the governor to veto separate items; and in some instances he is also allowed to reduce the amount carried by an item. The same remedy has been urged for adoption by the national government, but thus far without avail. There are, it is only fair to say, two sides to the question: power to veto items would enable the president to discriminate in a wholly undesirable manner, if he chose to do so, between proposed expenditures in which congressmen who supported him were interested and those which were of concern to his opponents; and Congress might fall into the habit, as have some state legislatures similarly situated, of gratifying departments and local constituents by voting appropriations far in excess of the estimated revenues and thus transferring to the president the burden of whittling down the appropriations, and also the official or popular disfavor likely to arise therefrom. The adoption, in 1921, of a budget system may, however, be regarded as having set up a partial safeguard against these possible abuses.²

¹ Effort has sometimes been made to show that this higher requirement is already the law. Thus in a case decided by the Supreme Court in 1919 the plaintiff contended that the Webb-Kenyon Act was not a valid piece of legislation, since, after its veto by President Taft, it was passed in the Senate by a vote of two-thirds of the senators present, which was less than two-thirds of the total membership of that body. The court refused to take this view. *Missouri Pac. Ry. Co. v. State of Kansas* 216 U. S., 262 (1910). See *Amer. Polit. Sci. Rev.*, XIII, 281-282 (May, 1919).

² See p. 504. Writing before the budget system was adopted, ex-President Taft expressed grave doubt about the desirability of giving the president the power to veto items. *Our Chief Magistrate and his Powers*, 27-28.

Convening Congress in special session, transmitting messages, and wielding the veto power do not exhaust the president's means of influencing legislation; there are a half-dozen well recognized modes of less direct, but often equally effective, control. The first is the threat of a veto. By letting it be known that he will veto a given bill unless certain features are added to it or other changes are made in it, the president may be able practically to determine the form which the measure will finally take. President Roosevelt went so far as to warn Congress publicly that he would veto certain measures which it had under consideration. Protest was raised against such virtual use of the veto power in advance, but no one could find anything in the constitution or laws to prevent a president from thus making his views and intentions known. A second source of presidential influence on legislation is the patronage. Long custom has made it the rule that senators and representatives shall be consulted, and shall be permitted to bring forward candidates, when important offices are to be filled in their state or district; and their political power and general prestige among their constituents are determined largely by their success in securing the appointment of such candidates. The president, therefore, holds the whip hand: if congressmen do not accept his ideas on legislation, he can cut them off from a share in the patronage. Positive threats and definite bargains of this nature are not often made. Nevertheless, members of Congress can hardly be expected to be oblivious to the practical advantages of being numbered among the supporters upon whom the president will feel that he can depend.

A third source of presidential influence is the personal interview. The president cannot appear on the floor of either branch of Congress to take part in debate, or for any other purpose, save to deliver a formal message. But this does not prevent him from discussing measures with the members, individually and in small groups, in his office at the White House, or even in the room set apart for him at the Capitol. Chairmen of committees and other influential members are frequently called into conference, especially when important legislation, *e.g.*, a great tariff bill, is pending; and on such occasions the president may urge or demand that a given measure be postponed, that it be advanced on the calendar, or that a bill be amended in specified ways. He may make a bold personal appeal, or even issue an ultimatum. In any case, his views, promptly carried back to the two houses by the conferees, are not

CHAP.
XVIIOther
modes of
control
over legis-
lation:1. Threat
of veto2. Use of
patronage3. Personal
interviews

likely to be without influence.¹ "Stand by the president" is, as a rule, a potent catch phrase in congressional halls. Executive control over legislation through this channel was notably broadened by Presidents Cleveland, Roosevelt, and Wilson. There arises, indeed, at this point a real presidential initiative in legislation. For, while neither the president himself nor any other member of the executive branch can actually introduce a bill in Congress, the president may, and occasionally does, bring about the drafting of a measure, which is formally introduced by a supporter and spokesman in the appropriate house. President Roosevelt was the real author of much of the legislation enacted during his seven years in the White House, and President Wilson had hardly less to do with the formulation of the Federal Reserve Act, the Clayton Anti-Trust Act, and other great measures of his first term than with the legislation of the later war period.

4. Appeals
to the
country

If all else fails, the president may carry his case by appealing directly to the people, capturing the confidence of the country, and calling upon Congress to meet the popular demand. Jackson did this, and so did Roosevelt and Wilson. It is a risky procedure, and the president who undertakes it "shakes the iron hand of fate." The cause must be a good one and the president himself of real stature and even brilliance. Smaller men generally fail, sometimes in humiliating fashion; Andrew Johnson's famous "swing around the circle" in 1866 was absurd and little short of pitiable.²

The
president
as party
leader

From what has been said, it is apparent that the president derives much of his actual power over legislation from his position as a party leader: he usually consults only his fellow-partisans in Congress on proposed appointments; he commonly seeks interviews with, and initiates legislation through, them alone; he must work in a reasonable degree of harmony with them if much is to be accomplished. Originally, the president was not a party leader; Washington thought of himself as responsible to no party and leader of no faction. But when parties took definite form and presidents began to be elected as party men, party leadership became as truly a function of the president as it is of the English

¹ A familiar example is President Taft's participation in the consideration of the Payne-Aldrich tariff bill of 1909. See F. A. Ogg, *National Progress, 1907-1917*, pp. 33-35.

² For some of Johnson's speeches on this trip and the heckling to which he was subjected, see W. L. Fleming, *Documentary History of Reconstruction* (Cleveland, 1906-07), I, 218-227. An interesting analysis of "presidential propaganda" will be found in L. Rogers, *The American Senate*, Chap. VII.

prime minister; and it is nowadays hardly a less important source of power than is the authority expressly conferred in the constitution. Jefferson, Jackson, Lincoln, McKinley, Roosevelt, and Wilson may be mentioned as presidents who in a preëminent degree dominated their respective parties. Tyler, Hayes, Garfield, and some other chief executives had less influence in this way, and Cleveland was, during his second administration, disavowed by his party following. But in most of these latter instances the circumstances were exceptional, and all pointed to the practical desirability of full and recognized presidential leadership.

The president is elected as a party man. He must surround himself with advisers who are of his own political faith. He must depend mainly on his fellow-partisans in Congress for the legislation necessary to the carrying out of his program. He represents the party throughout the whole country, as congressmen do not, and the country looks to him, even more than to Congress, for the execution of the policies to which his party is pledged. Everything that affects the standing and prospects of his party is of consequence to the success of his administration, and therefore of concern to him personally. Not unnaturally, he will expect to have, even though in purely informal ways, the supreme direction of his party's affairs. He chooses the chairman of the national committee and may further influence the composition of that body and of other party committees; he may take a hand in the selection of congressional and other candidates and may appeal to the voters to give them their support, as did President Roosevelt in the congressional elections of 1906 and President Wilson in those of 1918; he may suggest, and even dictate, what shall be in party platforms, both national and state; he may, indeed, practically dictate his own re-nomination or the nomination of the man whom he favors as his successor, as President Roosevelt forced the nomination of Taft by the Republicans in 1908; and he acts in close conjunction with, and if necessary brandishes the party whip over, his fellow-partisans in Congress as a means of procuring the legislation that he desires. "Under our system of politics," wrote Mr. Taft after retiring from the presidency, "the president is the head of the party which elected him, and cannot escape responsibility either for his own executive work or for the legislative policy of his party in both houses. A president who . . . ignored his responsibility as the head of the party for carrying out ante-election promises in the matter of new laws would not be doing what is expected of

His party
activities

him by the people. In the discharge of all his duties, executive or otherwise, he is bound to a certain extent to consult the wishes and even the prejudices of the members of his party in both houses, in order that there shall be secured a unity of action by which necessary progress may be made and needed measures adopted."¹

Naturally, the president's actual influence upon legislation depends considerably upon his personality, upon the state of public affairs, and especially upon whether his party is in control of both houses of Congress. Furthermore, influence and control do not flow in only one direction; the president is himself subject to a certain amount of guidance, and to a large amount of control, from Congress. In the give and take of personal relations with senators and representatives he may be induced to change his views or caused to modify his policy. Defeat of his measures or refusal of his requests may compel him to abandon a program in which he firmly believes. The Senate may reject his nominations to civil and military offices and refuse its assent to the ratification of treaties negotiated under his direction. Either house, or both, may make demands upon him for information which he cannot well withhold, however much he might prefer to do so, or may institute investigations of executive or administrative work for which he is directly or indirectly responsible. Congress may pass laws imposing new duties upon him or his subordinates, and may similarly limit the discretion of executive officers and require them to do given things in a certain way irrespective of the president's wishes. Finally, the House of Representatives may bring the president to trial under impeachment proceedings which, if successful when heard before the Senate, will lead to his removal from office.

None the less, the salient fact about the presidency is its steady accumulation of power, in the matter of removals, in the conduct of war, in the use of the veto, and even in the general control of public policy as shaped ostensibly by the legislative branch. The earlier presidents, as we have seen, took a modest view of their power. They were, in the words of a recent writer, "just about what the framers of the constitution expected the incumbents of the office to be."² Jackson, however, brought to the position not only an aggressive temper but an impatience with restrictions and with conservative traditions which was characteristic of the section

¹ *Four Aspects of Civic Duty*, 100.

² W. B. Munro, *Government of the United States* (rev. ed.), 130.

from which he came and of the generation in which he lived. In his hands the presidency became a far more potent force than before; and although after his day the office had its ups and downs, as it passed from stronger to weaker hands and back again, and as the times demanded of the chief executive a vigorous rôle or permitted a more passive one, none of Jackson's successors ever yielded a particle of the power which he claimed, and every fresh advance which they—Polk, Lincoln, Cleveland, McKinley, Roosevelt, Wilson—made became, in turn, a point of departure from which still more exalted claims to authority were projected.¹

CHAP.
XVII

The reasons for this enlargement of presidential power are not to be found in considerations of personal ambition and aggrandizement. Most of the presidents, being human, have found pleasure in the exercise of authority; but few, if any, have coveted power for its own sake, and the fear of some men in earlier days that the president would so overbear the other organs of government as to pave the way for monarchy has proved entirely groundless. The president's power has grown, in the first place, because the power of the national government as a whole has grown; merely to keep pace with this general expansion, whose causes are considered elsewhere,² would have entailed large accessions of presidential authority. Equally important, however, has been the urgent need of presidential leadership—in legislation and in general policy-framing—in lieu of the initiative and leadership which in a cabinet system of government like the English are wielded by the prime minister and his colleagues. Experience shows that Congress, when left to its own devices, tends to disintegrate into partisan and sectional elements and to flounder in a bog of contrary purposes. Even if there is capable and recognized leadership in the houses singly, there is usually no one save the president to bring the two branches together in effective support of great policies and measures. More and more, the people look to the president, not simply to speak for them in dealings with foreign governments, but to wield such a coördinating and directing power in domestic affairs as will get the things done that they desire; they expect him to manage Congress, and if he does not do so they pronounce him a failure. "The nation as a whole," a former incumbent of

The need
of presi-
dential
leadership

¹ H. C. Black, *Relation of the Executive Power to Legislation*, Chap. I.

² See Chap. XXIX. Cf. G. W. Alger, "Executive Aggression," *Atlantic Monthly*, CII, 577-584 (Nov. 1908).

the office has said, "has chosen him [the president], and is conscious that it has no other political spokesman. His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interest. If he rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its president is of such insight and caliber. Its instinct is for unified action, and it craves a single leader."¹

President Roosevelt "recognized and acted upon these facts more fully than had any occupant of the White House since Lincoln; and largely on that account his presidency became a notable epoch of constructive legislation and national revival. President Taft inclined to a legalistic view of the chief executive's functions, and hesitated to assert legislative leadership. He failed to get the legislation which the nation demanded; accordingly, the record of his administration was dimmed, and his own political fortunes were damaged. President Wilson, who admired the English cabinet system and long before his election had believed that our president ought to become something like a prime minister,² promptly assumed a leadership such as not even Roosevelt had conceived. . . . Many times his intervention in the work of law-making was denounced as dictatorial by his opponents, and it was disliked by some members of his own party. But his personal activity became a principal factor in his administration's imposing record of constructive and remedial legislation; and his conception and example of presidential leadership in legislation became his chief contribution to American political methods."³ President Harding was borne into office on a wave of reaction against the Wilson administration, and, coming fresh from the Senate, he started out to allow Congress to handle its business with a minimum of presidential interference. A few months, however, sufficed to show that the houses were incapable of making headway on this basis, and executive leadership was gradually

¹ W. Wilson, *Constitutional Government in the United States*, 68.

² See his *Congressional Government; a Study in American Politics* (original ed., Boston, 1885), Chap. v.

³ F. A. Ogg, *National Progress, 1907-1917*, pp. 227-228. See L. Rogers, "President Wilson's Theory of his Office," *Forum*, LI, 174-186 (Feb., 1916).

and cautiously revived on the lines with which the country had grown familiar.¹

CHAP.
XVII

Certain qualities, it is manifest, a president must have if he is to be successful; except under rare circumstances, he will realize the possibilities of his high office only in the degree in which he possesses them. He must be alert; he must be honest; he must be courageous; he must be tactful; he must have the gift of working with, and of managing, men; above all, he must be capable of making large decisions promptly, intelligently, and in clear-cut fashion. Not all presidents have fully measured up to these requirements. The office has happily been preserved unsullied by personal turpitude; but some incumbents have been too lenient toward self-seeking and corrupt men surrounding them. No president has been wanting in patriotism; but some have lacked courage and decision, and one or two have been notably deficient in tact. It is notorious that the presidency is not filled uniformly with strong men. Forty years ago Mr. (later Lord) Bryce included a chapter in his *American Commonwealth* entitled "Why Great Men are Not Chosen President";² although it was not meant, of course, to imply that none such are ever chosen. Had the election of the president continued on the lines planned by the fathers, the record would probably have been better. But, once it became a party matter, with candidates selected on grounds of personal and geographical "availability," and the people making the actual choice, the results could hardly be expected to be different from those we have witnessed. The rough and tumble of party politics kept Clay, Calhoun, Webster, Sherman, Blaine, Hughes, and Davis from the presidency and brought into the office mediocrities like William Henry Harrison, Pierce, Buchanan, and Andrew Johnson. On the other hand, it is but fair to observe that the system gave us Lincoln, Cleveland, Roosevelt, and Wilson, and that, as Lord Bryce more recently observed, "things have on the whole gone better than might have been predicted."³ The feature that stands out most prominently of all, however, is the tremendous growth of the power and importance of the presidency as an institution, relatively unaffected by the lack of force of the incumbent at any particular time.

Presi-
dential
qualities

¹See *Amer. Polit. Sci. Rev.*, XVI, 46-49 (Feb., 1922); M. Sullivan, "Two Years of President Harding," *World's Work*, XLV, 31-38 (Nov., 1922); W. B. Munro, "Two Years of President Harding," *Atlantic Monthly*, CXXXI, 384-393 (Mar., 1923).

²Vol. I, Chap. viii.

³*Modern Democracies*, II, 73.

CHAP.
XVII

Proposals
for closer
relations
between
the execu-
tive and
legislative
branches:

1. Heads
of depart-
ments to
have seats
in Con-
gress,
without
votes

Nothing better illustrates, indeed, the living, changing, dynamic character of our government than the readjustments continually taking place in the relations between the executive and legislative branches, notwithstanding that the provisions of the written constitution upon the subject go on from generation to generation unaltered. Equilibrium has not yet been reached in actual practice; and large, drastic changes are advocated by the theorists and reformers. Especially is it urged that the "subterranean" and "extra-legal" methods of executive influence and leadership now employed be replaced by arrangements and procedures frankly based on the new relationship that has arisen. Concrete proposals to this end naturally vary. To begin with one of the mildest, it is suggested that while the president himself remains on the outside, the heads of executive departments who compose his official family shall be given seats in the halls of Congress, where they may explain and defend measures in which the Administration is interested and make reply to inquiries concerning these and anything else upon which members may care to question them. Being civil officers of the United States, department heads are ineligible, it is recognized, to membership in either house.¹ But for the purpose in hand it would not be necessary to make them members; Congress can admit and hear any persons to whom it wishes to extend the freedom of the floor. The attorney-general and other heads of departments already appear before congressional committees to give information and answer questions. Would it not be better, it is asked, to give the entire membership of either house, or of both houses, a chance to hear what they have to say and to question them on uncertain or contentious matters? In the first Congress executive officers sometimes appeared upon the floor of one house or the other in order to present information; in 1865 a bill regularizing this practice in the case of the heads of departments was reported favorably; and in 1881 a Senate committee brought in a similar plan.² The earlier practice, however, never struck root; and all attempts to revive it have failed, although not from any lack of earnest proposals, both inside and outside of Congress.³

¹ Art. I, § 6, cl. 2. ² Senate Report, 46th Cong., 3rd Sess. (1881), No. 837.

³ The plan was probably nearest consummation in 1921, when three bills providing for it were before Congress, and when the scheme was considered favorably by President Harding and his cabinet. One of the bills proposed to admit to the floor of the House and Senate not only cabinet officers but heads of important commissions and boards. Bills on the subject were introduced also in 1924. For a suggestive argument against the proposal see R. Luce, *Congress—an Explanation* (Cambridge, 1926), 110-116.

Some critics would go considerably farther than this. The president and the principal departmental officers do actually, as everybody knows, initiate a great deal of legislation. They have to do so, however, in indirect, roundabout fashion, through senators or representatives whom they persuade to introduce their bills. Why not amend the constitution so as to make the heads of departments actual members of Congress, with the right not only to take part in debate but also to introduce bills, to serve on committees, and presumably to vote? Even this would not satisfy all students of the subject. Why not also have the rules of procedure of the two houses so amended as to give preferred treatment to Administration, or "government," proposals? For, obviously, executive leadership can attain its fullest scope only if and when the measures originating with the president and his cabinet advisers are assured of prompt, full, and decisive consideration on Capitol Hill. Occasionally—though not often—one hears the suggestion that Congress should wholly or practically give up its present powers of legislative initiative and content itself with receiving and acting upon the measures brought to it from the White House and the departments.

For the more modest of these suggestions there is a good deal to be said. The occasional attendance of heads of departments in the House or Senate to explain proposals and answer questions might well prove an advantage. Short of this, much could be gained, however, by more frequent appearance of such officers before committees; and it does not seem to have occurred to the advocates of the plan that, instead of expediting business, the effect would probably be to slow it up if members hostile to the Administration were to indulge their natural bent to ply its spokesmen with questions provocative of debate. The extremer proposals are of even more dubious value. To make cabinet officers members of Congress would contravene the theory underlying our entire system of government; to give the Administration a virtual monopoly of legislative initiative and of the working time of the two houses would be to displace that theory entirely in favor of the theory of English government—a theory which certainly has much to commend it, but which nevertheless is alien to the traditions and spirit of American institutions and not capable of being applied successfully unless we were to reconstruct our system root and branch. We have executive leadership already; there are means by which, if it tends to be too secretive, it can be driven into the open; conversely,

CHAP.

XVII

2. Heads of departments to be full members of Congress

3. Priority to be given "Administration" bills

Objections

through the press and other channels it can always secure as much publicity as it wants and defend Administration bills as forcefully as it chooses.¹

No prospect of adoption of English cabinet system

There is no denying that the theory of separation of powers is gradually losing its hold in this country, and that the establishment of closer working relations between the executive and legislative branches is, from most points of view, desirable, and is increasingly recognized to be so; perhaps three-fourths of all current discussions of government reform center in this general problem. Men agree more generally than in the old days that the conception of president and Congress as occupying "two islands of separate and jealous power" ought to give way to the feeling that there is but one government, harmonious in aim and operation. It will not do to assume, however, that we are about to adopt the cabinet system of England and other foreign lands, or that we ought to do so. As has been pointed out elsewhere,² there is much to be said for the cabinet system. It makes for unity, sensitiveness to popular feeling, and concentration of responsibility. But the success of it in England, or even in Canada and Australia, does not prove that it would yield satisfactory results in the United States, even if its adoption were a practical question among us. In point of fact, its adoption is far from being such a question. Our entire political experience has proceeded on different lines, and to change over from our present presidential form to the cabinet form would entail not only drastic amendments of the written constitution but, as has been said, a reconstruction of the entire theory on which our governmental system is based. Much has been gained by bringing the president and Congress out of their earlier isolation, and there is room for farther improvement in their interrelations; the admission of heads of departments to the floor of Congress, without votes, is practicable, desirable, and, one may venture to add, probable.³ But it is useless to spend words now on the relegation of the president to the position of titular

¹ As for the matter of "Administration" bills, it is true now, in actual practice, that measures introduced by members who are known to be "on the inside" and to be acting at the instigation of administrative chiefs or with the approval of the president are often given the right of way. P. D. Hasbrouck, *Party Government in the House of Representatives* (New York, 1927), 76.

² See p. 52.

³ The likelihood that this will eventually come about is increased by the enactment of the budget law of 1921 (see p. 504). The budget is prepared by the executive and it is plausibly argued that the executive ought to have an opportunity to explain and defend it on the floor of Congress.

head of a cabinet-governed country or the relinquishment by Congress of its full power of legislative initiative. If these things come about at all, it will be only after the adoption of transitional measures which are themselves as yet quite beyond the horizon.¹

CHAP.
XVII

REFERENCES

- J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chaps. VII, XX-XXI, XXV.
- W. Wilson, *Constitutional Government in the United States* (New York, 1908), Chap. III.
- , *Congressional Government* (Boston, 1885), Chap. v.
- H. L. McBain, *The Living Constitution* (New York, 1927), Chap. IV.
- E. Stanwood, *History of the Presidency from 1897 to 1909* (Boston, 1912), Chap. IV.
- A. L. Lowell, *Essays on Government* (Boston, 1889), Chap. I.
- G. Cleveland, *Presidential Problems* (New York, 1904), 3-78. A discussion of executive independence by an ex-president.
- S. W. McCall, *The Business of Congress* (New York, 1911), Chap. XI.
- D. S. Alexander, *History and Procedure of the House of Representatives* (Boston, 1916), Chap. XVIII.
- H. C. Black, *The Relation of the Executive Power to Legislation* (Princeton, 1919), Chaps. III-V.
- J. W. Garner, "Executive Participation in Legislation as a Means of Increasing Legislative Efficiency," *Amer. Polit. Sci. Rev.*, Supplement, VIII, 176-190 (Feb., 1914).
- L. Rogers, *The American Senate* (New York, 1926), Chap. VI. On congressional investigations.
- , "Presidential Dictatorship in the United States," *Quar. Rev.*, CCXXXI, 127-148 (Jan., 1919).
- G. B. Galloway, "The Investigative Function of Congress," *Amer. Polit. Sci. Rev.*, XXI, 47-70 (Feb., 1927).
- J. A. Fairlie, "Congress and Administration," *Mich. Law Rev.*, XXVI, 237-259 (Jan., 1928).
- E. C. Mason, *The Veto Power* (New York, 1891).
- H. J. Ford, "The Growth of Dictatorship," *Atlantic Monthly*, CXXI, 632-640 (May, 1918).
- , "A Program of Responsible Democracy," *Amer. Polit. Sci. Rev.*, XII, 492-497 (Aug., 1918).
- L. Coleord, "Making the Presidency Responsible," *Century Mag.*, CII, 247-251 (June, 1921).
- F. E. Leupp, "The Cabinet in Congress," *Atlantic Monthly*, CXX, 769-778 (Dec., 1917).

¹For a discussion of what the introduction of the cabinet system in the United States would mean, see A. L. Lowell, *Essays on Government*, 25-45. See also W. MacDonald, *A New Constitution for a New America*, Chaps. VI-VIII, and H. W. Horwill, *The Usages of the American Constitution*, Chap. VI.

- S. P. Orth, "Presidential Leadership," *Yale Rev.*, X, 449-466 (April, 1921).
- J. M. Leake, "Four Years of Congress," *Amer. Polit. Sci. Rev.*, XI, 252-283 (May, 1917).
- W. C. Redfield, "Cabinet Members on the Floor of Congress," *World's Work*, XL, 69-71 (May, 1920).
- W. E. Dodd, *Woodrow Wilson and his Work* (Garden City, 1920), Chaps. vi-vii.
- C. H. Rowell, "The Next Step in Washington," *World's Work*, XLIX, 155-163, 311-318, 400-408, 553-560 (Dec., 1924, to Mar., 1925). An interesting argument for closer relations between the executive and Congress.
- D. F. Houston, "The Balance of Power in Washington," *World's Work*, L, 187-194 (June, 1925).
- W. MacDonald, *A New Constitution for a New America* (New York, 1921). Advocates a general revision of the constitution, including the substitution of cabinet for presidential government.

CHAPTER XVIII

EXECUTIVE AND ADMINISTRATIVE ORGANIZATION

Except for limited use of the popular referendum in a number of countries, laws are regularly made at the capital and by a comparatively small body of men composing the legislature. Executive and administrative work, on the other hand, must, by its very nature, be carried on throughout the length and breadth of the land, and large numbers of officials and employees, of widely varying titles, powers, and importance, are required. In our national government the president is the chief executive, and upon him ultimately rests the entire burden of responsibility for the execution of the laws and for the performance of other duties, such as the conduct of foreign relations, which are commonly assimilated to executive work. But the president cannot personally execute the laws, or keep and disburse the public moneys, or manage the nation's postal service. There are no more hours in his day than in any other man's, and it is physically impossible for him to give attention to one-tenth part of the multifarious tasks that national officers must perform, even within the bounds of a limited section of the country. He acts directly in matters of large importance; he appoints and removes certain officers; and, when circumstances require, he concerns himself laboriously with administrative details. But in the main he looks to his principal subordinates to keep the machinery of government in motion; and for months, and even years, at a time his relations with a given branch of administration may be purely nominal.

The "executive civil service," which thus, under the president's general direction, carries on from day to day the multifold activities of the national government, has grown from a few thousand persons a century ago into a huge establishment. On June 30, 1916—shortly before the sudden increase made necessary by the country's entrance into the World War—the service contained, in all, 438,057 employees. A maximum of 917,760 was reached at the date of the armistice (November 11, 1918), after which there naturally was a reduction. Since 1921 the figure has fluctuated between

Volume of
executive
and ad-
ministra-
tive work

Extent
of the
civil
service

600,000 and 550,000, being on June 30, 1927, 559,138¹ approximately one two-hundredth of the entire population of the country. Contrary to popular impression, this great force is not made up solely of "government clerks." It contains a vast array of scientists, *e.g.*, biologists, agriculturists, engineers (civil, electrical, hydraulic, mining, sanitary, and road), foresters, geologists, live-stock experts, entomologists, astronomers; an impressive corps of financiers, economists, statisticians; a great body of experienced administrators. "It is these men and women, together with the clerks, that form the continuous, uninterrupted, highly specialized means of carrying on the enormous business of government, irrespective of party lines or changes of administration. It is they who administer the laws of the United States, who carry out the injunctions of Congress, who protect the far-flung domains of the people."

How is this great staff organized and controlled? How are its members appointed and removed? How is the government's work divided up among them for supervision and performance? To these important matters we must now turn—matters, it may be added, which bring the operations of government very close home to us. In the present chapter the executive and administrative system as a whole will be outlined; in the next two chapters the ten great departments will be described one by one, the steady growth of national activities will be noted, and something will be said about the problems of reorganization which this entails.

A half-dozen features of the general scheme at once suggest themselves as fundamental. (1) The national government, as we have seen,² maintains its own full quota of officials and employees, only rarely and incidentally utilizing for its purposes the officials or employees of the states. This differs from the practice in some other federally organized states, *e.g.*, Switzerland, where local or divisional officers are extensively employed in the administration of national laws.³ (2) With several important exceptions, the ex-

General
features of
the depart-
ments

¹ *Forty-fourth Annual Report of the U. S. Civil Service Commission* (1927), 3. The executive civil service, it should be noted, does not include the army, the navy, or the judicial establishment. Of the total number of employees in 1927, 59,800 were in the District of Columbia and 499,338 were in parts of the country outside the District, and, in the case of consular and diplomatic officers, beyond seas as well. Almost 80,000 were women; and the total annual outlay for salaries and wages was in the neighborhood of \$800,000,000.

² See p. 131.

³ F. A. Ogg, *Governments of Europe* (rev. ed.), 571. By a wide departure from precedent in this matter, the administration of the Selective Service Act of May 18, 1917, was entrusted to state and local officials. See E. H. Crowder, *The Spirit of Selective Service* (New York, 1920).

ecutive and administrative activities of the government are gathered in main branches or divisions, known as "executive departments," which in all cases have been established by act of Congress. The constitution does not set up departments, or say how many departments there shall be, or what they shall be called. It, however, plainly assumes that departments will exist: it authorizes the president "to require the opinion, in writing, of the principal officer in each of the executive departments"; and it empowers Congress "to vest the appointment of inferior officers in the heads of departments." Beginning with the departments of State, War, and Treasury, created in 1789, ten departments in all have thus far been established.¹ There are upwards of fifty detached boards, commissions, and other agencies; nevertheless, there is a far greater amount of coördination and centralization than in the administrative systems of most of the states. (3) There is some overlapping of functions among the departments, and occasionally an official has to do with the work of more than one department. But, speaking broadly, each department is separate from the others in both functions and personnel. (4) In their internal organization the departments vary rather widely, yet certain features regularly appear. In the first place, all are organized under single heads. The constitution does not require that this shall be so; although it is fair to assume that when the framers wrote the provisions concerning department heads they had individual officials, not boards or other groups, in mind. Boards and commissions are employed in most of the detached services, and are very commonly used in the state governments. But every national department is presided over by a single official, known in most instances as a secretary. Furthermore, practically all of the departments have from one to four assistant secretaries and a chief clerk. And the work is distributed among a number of bureaus and divisions, usually with a single head variously known as "commissioner," "director," "comptroller," or "chief"; although the distribution is not always logical or stationary, and the relation of bureau to division follows no clear principle. (5) Heads of departments are directly and fully responsible to the president. Congress can impose duties on them with which the president cannot interfere, and it can remove them by impeachment. But it is the president who is held principally responsible for their official acts. Whatever is done by

¹The complete list is: State (1789); War (1789); Treasury (1789); Navy (1798); Post Office (head admitted to cabinet in 1829); Interior (1849); Justice (1870); Agriculture (1889); Commerce (1903); Labor (1913).

any one of them is considered as done by the president himself. He, very justly, has almost complete freedom in appointing them; he directs their activities; and he has unrestricted power to remove them. They are answerable to him for all that they do in their official capacity, being therefore in a wholly different position from that occupied by department chiefs in England and other cabinet-governed countries, who are immediately responsible to the popular branch of the legislature.

Considerations influencing the selection of department heads:

1. Party status

As we have seen, the heads of departments occupy a dual position; they are at the same time chief administrators of their several branches of the government service and advisers to the president on questions of public policy, and, secondarily, on party matters. Speaking broadly, they are selected with both the administrative and the advisory functions in mind. Several other considerations, however, enter into the president's choice. First, the appointees must normally be of the president's party. Washington made Jefferson secretary of state and Hamilton secretary of the treasury. But friction arose, and it soon proved desirable to bring the chief offices into the hands of men who stood closer together in political matters. Since 1795 the principle of party solidarity has been followed closely. Cleveland, indeed, appointed to the position of secretary of state a man who had been thought of as a Republican candidate for the presidency.¹ But the appointee had supported Cleveland in the electoral campaign. Taft and Roosevelt each appointed a Democrat as secretary of war. But in both instances the appointee had not been prominent in national politics. The few exceptions merely prove the rule. This regard for party affiliation does not mean, however, that only party leaders are appointed. The earlier tendency to look upon the cabinet as a council of party leaders has practically disappeared. The appointees belong to the party in power at the White House; but, as a rule, half or more of them are not party leaders in any large sense of the term, and some have had no active part in politics whatever.²

2. Other grounds

Other practical considerations which more or less influence the president's selection are geographical distribution and the representation of various wings or factions of the party. It will not

¹ Walter Q. Gresham.

² W. Wilson, *Constitutional Government in the United States*, 75-76. On the other hand, of course, members are occasionally chosen mainly or solely because of their services as party leaders or officers. A single example is the selection of Mr. Will H. Hays for the postmaster-generalship by President Harding, whose campaign the appointee, as chairman of the Republican national committee, had managed.

do to take all of the cabinet officers from the East, or from the West, or from any single section of the country. Although President Wilson's first cabinet included members from eight different states, it was criticized in some quarters because—as was also true for a time during Roosevelt's presidency—three were residents of a single state, *i.e.*, New York. Appointment of representatives of different elements in the president's party is designed, of course, to conciliate opposition and to promote solidarity. A good illustration is President Wilson's appointment of Mr. Bryan as secretary of state in 1913, with a view to winning for the Administration the support of the more radical wing of the Democratic party. Still another powerful factor is personal friendship and favor. Every president takes into his official family men whom he knows but slightly. But he is likely to include also one or two men who, whatever other claims they may have, are first of all personal friends. President Jackson added to the political liveliness of his time by appointing his friend Major Eaton secretary of war; President Grant made his patron of early days, E. B. Washburne, secretary of state; Presidents Fillmore, Harrison, Cleveland, and McKinley found portfolios for their law partners; Presidents Roosevelt and Harding made several appointments in which the personal factor was prominent; and President Coolidge, after being balked by the Senate in his effort to fill the attorney-generalship with a prominent Michigan lawyer, turned to an unknown, small-town Vermont attorney who had long been an intimate acquaintance. All told, however, a steadily increasing proportion of cabinet officers are chosen for their special knowledge and experience or their administrative ability, proved or presumed. Frequently they are men who have not been in politics, but have attained eminence in the professional or business world. The secretary of the treasury is very likely to be of this sort, as, for example, William G. McAdoo and Andrew W. Mellon; the secretaries of commerce and agriculture also, as in the instances of Herbert Hoover, David F. Houston, and William M. Jardine. Three-fourths, on an average, have had previous experience in public office; about half have served in Congress. Contrary to early practice, few are now carried over from one administration to another, even when there is no change of the party in power.¹

¹ A vice-president called upon to fill out a term usually, however, continues the cabinet unaltered, at least for a time. For a characterization of the members of a typical cabinet (that of President Coolidge as it stood in 1925) see *Amer. Yr. Bk.* (1925), pp. 106-120.

CHAP.
XVIIIFunctions
of heads of
depart-
ments:1. Direc-
tion

Heads of departments exercise their functions both singly and collectively: singly, they are in charge of the several great branches of administration; collectively, they form the president's cabinet. Subject to the directing power of the president and to a certain amount of control by Congress, the department head, as such, directs and supervises the work of all bureaus, divisions, officers, and other agencies in the department under his care. He cannot personally watch the whole of it, but he must keep himself informed upon it, and must be at all times ready to assert his superior authority with a view to increased harmony and efficiency. In the second place, he exercises considerable control over the personnel of his department. This he does mainly through the appointment of such inferior officers as Congress, under the familiar constitutional provision dealing with appointments,¹ authorizes to be named in this way. Most of the positions thus arranged for are now included in the classified service, and are filled in accordance with civil service regulations to be explained below.² This, of course, narrows the appointing officers' discretion. The power is, nevertheless, an important one; and it is supplemented by a somewhat restricted, yet substantial, power of removal.

2. Appoint-
ment and
removal3. Issuing
regulations

Another very important function is promulgation of regulations covering various aspects of the department's administrative work. The president, as we have seen, has an extensive ordinance power.³ But in many cases the administrative regulations issued by virtue of this power are prepared in the departments and issued in their name, or even in the name of a bureau or division. The president may direct such regulations to be issued, and may insist on seeing and approving them before they are sent out. But in most cases the department officers may themselves take the initiative. Indeed, each department head is authorized by statute "to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it;" and also to make appropriate rules to secure a proper examination of accounts. Furthermore, specific ordinance powers covering other matters have been conferred on particular department heads, bureau chiefs, commissions, and other administrative agencies; for example, the secretary of the treasury has been authorized to prescribe regulations for enforcing the customs and

¹ Art. II, § 2, cl. 2.² See pp. 289-292.³ See p. 244.

internal revenue laws, and for preventing the introduction of contagious and infectious diseases at our ports, and the secretary of agriculture has been authorized to make rules governing the importation and interstate movement of animals and plants, the protection of forest reservations and of migratory birds, and the execution of acts of Congress relating to meat inspection.¹

Still another important thing that the department head has to do is to decide disputes arising out of the acts of his subordinates. In the administration of the laws governing such matters as immigration, foreign and interstate commerce, taxation, and public lands great numbers of controversies inevitably come up. Persons adversely affected may feel that an official has exceeded his powers, or that he has reached a decision not warranted by the facts in the case; and fairness demands that an opportunity be allowed for a reconsideration of the decision or action. Conceivably, all such questions might be carried to the courts. But it has been pointed out that, while appeal to the courts is proper when the construction of a law is involved, such appeal, if permitted in the general run of disputes arising out of the ordinary daily transactions of the departments, would "entail practically a suspension of some of the most important functions of government."² Hence, except under the condition mentioned, appeal normally lies only to higher administrative officials or boards, including the heads of departments; and in many kinds of cases the decision of the department head is final, although in others there is appeal to the president himself.³

Finally, it is the duty of the head of a department to give both the president and Congress information and advice on matters pertaining to his branch of the service. The Treasury and Post-Office departments were organized without reference to presidential control, and the Treasury head reports to Congress directly. In the acts creating the State, War, and Navy departments the president's directing authority is expressly recognized, and in the measures establishing the remaining departments it is clearly implied. In practice, however, all departments are on a common footing in this matter; all make reports which quickly become the com-

CHAP.
XVIII

4. Deciding appeals

5. Giving information

¹ This subject is clearly treated in J. A. Fairlie, "Administrative Legislation," *Mich. Law Rev.*, XVIII, 181-200 (Jan., 1920).

² *School of Magnetic Healing v. McAnnulty*, 187 U. S., 94 (1902).

³ L. F. Post, "Administrative Decisions in Connection with Immigration," *Amer. Polit. Sci. Rev.*, X, 251-261 (May, 1916); G. R. Pierce, "The Land Department as an Administrative Tribunal," *ibid.*, 271-289; E. C. Finney, "The Board of Appeals of the Department of the Interior," *ibid.*, 290-295.

mon property of the president and Congress, and both of these superior authorities may call upon them at any time for information. The president usually asks the department head orally for any data that he desires, although he may make the request in writing. Congress, or either house, makes its requests through the medium of resolutions. Armed with the power of removal, the president is able to enforce compliance. But Congress is in a different position; if the department head refuses to accede to its request, and is supported by the president in this attitude, it is helpless, unless it is willing to resort to the extreme expedient of impeachment. The Supreme Court has held, furthermore, that when the head of a department is required to give information he may do so through subordinates, rather than in person.¹

The subordinate civil service

Thus far we have spoken only of the heads of departments. What of the great body of subordinate officers and employees who work in the departments and the detached establishments—at Washington and throughout the country, and even beyond the bounds of the country—from assistant secretaries and directors of services at the top to watchmen, firemen, and other laborers at the bottom? Some impression of the multifold activities of these hundreds of thousands of public servants will be conveyed by the next two chapters, dealing with the great executive departments and their respective fields of work. Here we have to do, rather, with such general organizational matters as appointments, removals, promotions, classification, compensation, pensions, and machinery for protection and betterment.

Rise of the spoils system

The first fact to be observed is that, whereas from the second administration of Washington onwards appointments were commonly made with reference to the appointee's political affiliations, few removals from subordinate positions were dictated by political considerations prior to the time of Jackson. An act of 1820 fixing a four-year term for district attorneys, collectors of public moneys, and some other groups of officials, looked, however, to more frequent rotation in office;² and the election of Jackson, in 1828, definitely opened the way. Jackson himself believed that prolonged tenure of office leads to laxness and corruption, and considered that, in any case, one man has as much right to public office as an-

¹ *Miller v. Mayor of New York*, 109 U. S., 394 (1883).

² C. R. Fish, *The Civil Service and the Patronage*, 65-70. Subsequent statutes brought many additional groups of officers under the four-year rule, *e.g.*, all postmasters.

other;¹ and he gave his views practical application, not indeed by making a "clean sweep" of anti-Jacksonian office-holders, yet by removing some two thousand officers and employees, of all grades, during his first year. The blame for fastening the spoils system upon the country is, however, not to be laid entirely, or even mainly, at Jackson's door. In the first place, the system was already prevalent in state and municipal governments, being now merely carried over into the national government.² In the second place, the elaboration of party machinery and the intensification of party politics must inevitably have led to an increased use of public offices as rewards for party service. Finally, Jackson's views on office-holding, while abhorred by many people, were warmly endorsed by those forces of the new democracy, especially in the West and South, that had been chiefly responsible for his election. When, in 1832, William L. Marcy, a rising politician of New York, summed up the arguments of the Jacksonian newspapers in the remark, "To the victors belong the spoils," he coined a phrase that struck home;³ removals, as well as appointments, for party reasons became part of the accepted order of things.

CHAP.
XVIII

Men, however, could not wholly close their eyes to the system's undesirable workings. Experienced and worthy public officials were ousted on all sides to make room for political henchmen. The public services were thrown into demoralization every time a change of administration took place. The president was harassed almost beyond endurance by place-seekers and their friends, and congressmen tended to become mere solicitors and dispensers of patronage. As early as 1853 Congress undertook, in a feeble way, to improve conditions by requiring that certain clerkships in Washington should be classified on a basis of compensation and that candidates should be appointed to these positions only after examination by the head of the appropriate department. Even on this limited scale, the reform came to nothing; only "pass" examinations were required, and the administration of them soon grew very lax. After the Civil War the need of a change of policy became greater than ever before, and in 1871 Congress, with the approval of President Grant, passed an act authorizing the president to prescribe regulations for admission to the civil

Beginnings
of reform

¹ Fish, *op. cit.*, Chap. iv.

² H. L. McBain, "DeWitt Clinton and the Origins of the Spoils System," *Columbia Univ. Studies in Hist., Econ., and Public Law*, XXVIII (1907).

³ The phrase was used in a speech in the United States Senate, *Register of Debates in Congress*, VIII, Pt. 1, 1325.

service and to ascertain the fitness of candidates. Grant thereupon appointed our first civil service commission. George William Curtis, a leading advocate of the reform, was made chairman; and a system of competitive examinations, on a small scale, was introduced. Before the plan could be very widely applied, however, differences of opinion arose between the president and the commission, and in 1873 Curtis resigned. In 1875, furthermore, Congress refused to continue the necessary appropriation. The commission lived on, and in 1877 the examination system was revived for the postal and customs employees in New York City. But the general reform contemplated in the original legislation failed of realization.

The act
of 1883

The cause was not lost. Able men turned their best energies to its support; national and state civil service reform associations were organized; recent reforms in Great Britain were investigated and made familiar to American readers.¹ *Harper's Weekly*, the *Nation*, and other influential journals took up the fight; political parties repeatedly put planks on the subject in their platforms; and the assassination of President Garfield by a disappointed office-seeker in 1881 supplied the last necessary impetus. Early in 1883 Congress passed the Civil Service Act²—commonly known as the Pendleton Act—which, with certain amending statutes, is to this day the fundamental law governing admission to and status in the federal service.

Expansion
of the
merit
system

At the outset, the reform did not extend far. The secretary of the treasury and the postmaster-general were directed to classify certain subordinates in their departments, with a view to the application of the merit principle to these positions; and the president was authorized to require, at his discretion, other heads of departments and offices to take similar action. In the first year the provisions of the law applied to somewhat less than fourteen thousand members of the service. Gradually, however, the number was increased, not only absolutely, but as compared with the total body of employees. By 1897 it was 87,108; by 1905 it was 178,807; by 1916 (the last year before the abnormal increase of government employees on account of the World War) it was 296,926, or approximately sixty-eight per cent; and in 1927 it was 422,998, or

¹ Especially through a book entitled *The Civil Service in Great Britain* (New York, 1880), written by an ardent reformer, Dorman B. Eaton, whom President Hayes commissioned to study the British system. After ineffectual preliminary steps, Great Britain adopted a comprehensive merit plan by an order in council of 1870. A. L. Lowell, *Government of England*, I, Chap. vii.

² *U. S. Statutes at Large*, XXII, 403-407.

practically seventy-five per cent. In part, the increase arose from occasional acts of Congress placing specified positions, whether new or old, in the "classified service," *e.g.*, an act of 1902 classifying the employees in the census office and an act of 1927 creating the prohibition bureau in the Treasury Department and requiring that all employees of the bureau acquire a civil service status through the usual channels of competitive examination. In the main, however, it arose from successive executive orders issued in pursuance of discretionary authority conferred in the statutes. Thus President Roosevelt, in 1901-02, brought into the classified service the rural free delivery employees, and in 1908 the fourth-class postmasters in the region north of the Ohio and east of the Mississippi; and President Taft, in 1910, similarly brought in all assistant postmasters and clerks in first- and second-class post-offices, and in 1912 all remaining fourth-class postmasters. By one process or another, all of the subordinate officers and employees of the government have now been brought within the classified service and placed upon a merit basis except (1) incumbents of some seventeen thousand "presidential" offices, *e.g.*, chief positions in the diplomatic service and first-, second-, and third-class postmasterships, filled by appointment by the president and Senate, (2) about twelve thousand holders of positions specially excluded by law from classification, *e.g.*, deputy collectors of internal revenue, and (3) at the bottom of the scale, a varying number (usually around fifty thousand) of common laborers. Inclusion by executive order has almost reached the extent permitted by existing laws; but Congress itself still adds new groups from time to time.

The object of the act of 1883, and of its progressive application to the great bulk of federal employees, has been, of course, to secure appointment with reference to fitness, coupled with continuance of tenure during satisfactory service. To aid the president and other appointing authorities in realizing these purposes, there exists a special piece of machinery, which naturally is not attached to or under the control of any one of the departments. This is the Civil Service Commission—a board of three appointed by the president and Senate under the requirement that not more than two members shall be "adherents of the same party."¹ A staff of some three hundred and sixty persons—examiners, clerks, etc.—

¹Numerous other federal agencies (some of which will be described presently) have to do, in one way or another, with personnel work in the service. These include the bureau of efficiency, the personnel classification board, the bureau of the budget, the comptroller-general, the employees' compensation

is maintained at Washington; the country (including the insular dependencies) is divided into thirteen civil service districts, each in charge of a secretary appointed by the commission; and the machinery is completed by upwards of five thousand local examining boards, made up of collectors of revenue and other national officers who are called into special service for this purpose from time to time by the commission, without extra pay. The law requires that examining boards shall be set up at sufficiently numerous places to enable candidates to attend examinations without undue expense or loss of time; and the greater part of the field positions are filled from registers kept, not at Washington, but at the district offices.

The steadily increasing numbers of officials and employees who come under the law are affected by its provisions in three principal respects, namely, as to appointment, tenure, and promotion. Except for a considerable number of offices which for special reasons are filled without competitive examination, although included in the classified service, appointments are made only on the basis of the showing of candidates in competitive examinations. These tests are arranged for by the commission, announced in advance in newspapers and on placards displayed in post-offices and other public places, and administered in various cities throughout the country by the examining boards. They may be either written or unwritten, or both. Candidates for the great bulk of positions of a clerical or other subordinate character are examined in groups, and exclusively in writing; those seeking positions which call for scientific, technical, or other special attainments are rated competitively in respect to experience, education, training, and fitness, as ascertained usually by interviews and testimony rather than by a formal written examination. In the one case the examination is said to be "assembled;" in the other, "non-assembled." In the preparation of examination questions, the commission enlists the aid of experienced persons in the several departments, and occasionally of outside experts.

The law requires examinations to be "practical in their character," and the law also requires that the examination be held by the commission, the pension bureau, the Post Office Department (to which the Civil Service Commission has delegated a large amount of its field work), not to mention various labor boards which have certain functions in connection with the classification and compensation of positions in the navy yards, etc. See "How the Federal Government Handles its Personnel Work," *The Public Business*, I, Nos. 7-8 (Dec.-Jan., 1926-27). The Civil Service Commission has considerably less authority than is given to similar agencies in many states and cities. It is also inadequately financed.

acter" and, so far as possible, to "relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed." Herein our American system differs sharply from the English system. In England the competitive principle is carried nearer to the top of the government service than with us; public service is looked upon to a greater extent as a profession, and even a career; and the main object of the examination system is to recruit the service from young men who expect to spend their lives in the public employ and whose education and native ability make it probable that they will rise from one grade to another and steadily grow in usefulness as administrators. Hence English examinations are framed mainly with a view to testing the candidate's general attainments, and especially his intellectual capacity. Mathematics, history, the classics, science—these and other branches of higher learning enter prominently. Even the examinations for positions of a purely clerical nature are conducted on this principle, although naturally they are based upon more elementary subjects. Under the American plan, the object is not, save incidentally, to test general attainments and capacity. It is, rather, to ascertain the applicant's technical proficiency and present fitness for the kind of work that he seeks.¹ "The result is startling. In England the highest positions are filled by examinations as difficult as the honor examinations in the best universities, while the lower positions require considerably more training than is obtained in the average American high school. As a result, the English service attracts to it a highly educated class, untrained it is true in the technical duties of their position, but fitted to develop into very useful and able officials. In the United States, the examinations, except for the positions requiring scientific or technical knowledge, in general require not much more than the ordinary high-school education, together with some technical proficiency. As a result, the candidates do not have the education and general ability of the English officials and are frequently men of less capacity than are found in private enterprises."²

CHAP.
XVIIIContrast of
American
and
English
systems

¹ Even so, the complaint is often heard that our examinations are too "scholastic" or academic. See a reply to this charge by Chief Examiner Wales, *Thirtieth Annual Report of U. S. Civil Service Commission* (1913), 28-29.

² E. Kimball, *National Government in the United States*, 229. The English and American systems are further compared in R. Moses, "The Civil Service of Great Britain," *Columbia Univ. Studies in Hist., Econ., and Public Law*, LVII, No. 1 (1914), Chap. ix.

Formerly, aliens were permitted to take the examinations, and occasionally they received appointments. Examinations nowadays, however, are open only to citizens, except in the rare event of a lack of citizen applicants. There is no fee, and the number of persons examined is always far in excess of the number of places to be filled.¹

On the registers of the Civil Service Commission, at Washington and in the offices of the district secretaries, are kept the names of all persons who have passed the various examinations with an average grade of seventy. Appointment, of course, withdraws a name from the list. But it is dropped in any event at the end of a year and can be reinstated only by another examination. When a clerk or stenographer or other employee in the competitive classified service is needed by a department, the commission supplies the appointing officer with the names of three persons who stand highest in the appropriate list of eligibles. The officer appoints one of the three, and the other two resume their places on the waiting list. If no one of the three is appointed, the officer must be prepared to assign some good reason when asking for more names. Every appointee is put on probation for a period of six months (or longer, if the commission and department agree), and the appointment becomes definitive only if he is retained beyond that time. The free working of these arrangements is, however, obstructed by certain special statutory provisions. War veterans (including those who saw service in the World War), if honorably discharged, are given various advantages, chiefly that of having five points arbitrarily added to their earned ratings—ten points in the case of disabled veterans—and figures for 1927 showed that about one-fourth of all appointees were “preference eligibles” on this basis. Furthermore, an attempt is made—although the rule cannot be fully carried out—to apportion appointments in the departments at Washington among the several states and territories and the District of Columbia upon a basis of population, regardless of the relative ratings of the applicants.

An essential feature of the merit system is security of tenure. There is, of course, no complete immunity from removal. The courts have held repeatedly that, the power to remove being an incident of the power to appoint, that power is not to be regarded as wholly cut off by any regulations that Congress or the Civil

¹ Thus in the fiscal year ending June 30, 1927, a total of 267,340 persons were examined, while only 46,534 received appointment.

Service Commission may make. But no official or employee in the classified service may be removed for refusal to render political, *i.e.*, party, service or to contribute to a political fund; and an act of 1912, incorporating a former rule of the Civil Service Commission, specifies that no person in the competitive service shall be removed except "for such cause as will promote the efficiency of the service." It is open to the president or other appointing authority to remove any one of his appointees whom he judges to be inefficient, dishonest, or otherwise a hindrance to good administration. The reasons for the action must be given in writing, and the person whose removal is proposed must be allowed an opportunity to answer in writing any charges brought against him. He cannot, however, demand a hearing before dismissal takes effect, as is commonly permitted in state and municipal civil service systems.

CHAP.
XVIII

Practically, the merit laws, upheld by a growing public sentiment and by a high sense of honor on the part of the presidents, give employees in the classified service—whether appointed by competitive examination or not—substantial assurance of being retained in the service as long as their work is satisfactorily performed. In return for this protection, one main requirement—in addition to efficient discharge of duty—is made of them, namely, that they shall abstain from activity in party politics. They are not disfranchised, and they are at liberty to talk privately about political matters. But they may not use their official authority or influence to coerce the political action of any person or body, or to interfere with an election or influence the results thereof, and they may not solicit or receive contributions for political purposes from any national officer or employee. Furthermore, under a presidential order of 1907 members of the competitive classified service may "take no active part in political management or in political campaigns"—a rule which has been construed by the Civil Service Commission to forbid membership in party conventions, addressing party caucuses, conventions, or other gatherings, participating in the preparation of party resolutions or platforms, serving on party committees, giving public expression to political views, assisting in getting out the voters on election day, serving as an election officer, distributing campaign literature or emblems, publishing anything in the interest of a particular candidate or party, and a long list of other activities having a partisan aspect.¹

Restraints
on political
activity

¹ *Thirty-third Annual Report of the Civil Service Commission* (1916), 35-36.

Alleged violations of any of these regulations by members of the competitive service are subject to investigation by the commission, and many cases are looked into and reported upon every year.¹ The commission itself, however, has no power of removal; and it has frequently complained that its recommendations have not been carried out by the authorities vested with that power. Officers who stand outside of the classified service, *e.g.*, the heads of departments, are not forbidden to engage in political activity; and, in the case of such officers, at all events, as have to do with the determination of the policies of the Administration, this is a reasonable exemption. The latitude that is allowed is, however, often abused, and it would be beneficial if the Civil Service Commission were given, in accordance with its repeated recommendations, the same right to investigate and report on cases of alleged excessive political activity outside of the classified service which it has long exercised inside that service.

A necessary feature of a satisfactory civil service system is an arrangement for promotion on the basis of merit. The act of 1883 provides that no person shall be promoted in the classified service "until he has passed an examination," or is shown to be specially exempted from such examination by law; and at suitable intervals formal competitive examinations for promotion are held. Experience, however, has taught that the fairest and best basis of promotions is, not set examinations, however searching, but continuous records of employees' diligence, punctuality, faithfulness, resourcefulness, and accuracy. Accordingly, an act of 1912 required the Civil Service Commission to establish a system of "efficiency ratings" for the classified service in the District of Columbia, these ratings to be based on efficiency records systematically kept in the several departments, and to be used by appointing officers, along with the results of such examinations as might be held, in authorizing promotions. A "division of efficiency," created in 1912 as an arm of the Civil Service Commission, became, in 1916, an independent bureau of efficiency, charged with receiving, tabulating, and making constantly available the efficiency record of employees in the national capital, and with investigating the administrative needs of the service relating to personnel in the several departments and independent establishments.

¹In the fiscal year ending June 30, 1927, 128 cases of alleged political activity came before the commission. Investigation led to the dropping of 52 officials, while 65 others were warned and reprimanded and the removal of 8 was recommended.

The bureau started off inauspiciously, and throughout its history it has been the object of a great deal of criticism. In later years, however, it has accomplished something. Minimum ratings have been prescribed which must be attained by an employee before he can be promoted; also ratings below which he cannot fall without being demoted, and still others which automatically entail dismissal. The plan as thus far developed leaves much to be desired. But the problem is a difficult one, and experience now being gained may eventually suggest the correct and full solution.¹

CHAP.
XVIII

The further improvement of the executive civil service presents several difficult problems. The first is the extension of the merit principle to important classes of positions to which it does not now apply. We have noted that in England the competitive system is carried well toward the top of the official scale: in the departments the dividing line is between the "permanent" under-secretaries, who commonly attain their positions by promotion, and the "parliamentary" under-secretaries, who are regarded as ministers and, as such, are appointed on a party basis. In our own country there is no such clear dividing line, but at all events the merit system terminates decidedly farther down. The heads of departments are, or at least may be, appointed on a party basis. The same is true of assistant secretaries, and to a large extent of heads of bureaus and special services, although the increase in the number of scientific bureaus (notably in the Department of Agriculture) in recent years has steadily enlarged the number of bureau chiefs who, originally selected mainly for their professional standing, hold office virtually on good behavior, though nominally removable at the pleasure of the president.² Outside of Washington, the principal officers in large portions of the government service still stand outside the merit system, *e.g.*, in the customs service, the internal revenue service, the mint and assay services, the public lands service, the reclamation service, the immigration service, and the field services of the Department of Justice, embracing the district attorneys and marshals. Appointments to practically all of these higher positions are made by the president

Problem of
extending
the merit
system
upwards

¹G. A. Weber, *Organized Efforts for the Improvement of Methods of Administration in the United States* (New York, 1919), 104-113; L. D. White, *Introduction to the Study of Public Administration* (New York, 1926), Chap. xiv; "The Personnel Work of the U. S. Bureau of Efficiency," *The Public Business*, II, Nos. 5-6 (Oct.-Nov., 1927).

²A. W. Macmahon, "Bureau Chiefs in the National Administration of the United States," *Amer. Polit. Sci. Rev.*, XX, 548-582, 770-811 (Aug., Nov., 1926).

and Senate, and the president has no power to put them in the classified service; although there is nothing to prevent him from setting up a system of tests by which to determine what men he will nominate to the Senate for any of the places in question—a thing which President Wilson, in 1917, actually did in connection with the eleven thousand first-, second-, and third-class postmaster-ships, after Congress had failed to pass a law putting these positions in the competitive classified service.¹ Full incorporation of such groups of officials in the competitive service could be accomplished only by act of Congress abrogating the “advice and consent of the Senate” and vesting the appointments in the president alone, or, perhaps better, in the heads of departments, accompanied with an abrogation of the four-year term (or other fixed term) in so far as it now applies. Admittedly, such action—which was, indeed, twice recommended by President Taft in 1912, endorsed in principle by President Harding, recommended by President Coolidge in 1924, and urged by the Civil Service Commission—would be difficult to bring about: politicians, particularly in the Senate, would be pretty solidly against it. For the present, more is to be expected from voluntary executive action; although, obviously, a reform resting on this basis is less stable and secure than one resting on the mandate of the civil service law.

However accomplished, the reform is greatly needed. Economy and efficiency throughout the executive service depend very largely on the capacity and experience of these higher officers; political appointments here have a demoralizing effect on the service from top to bottom; with these superior positions on a political basis, subordinates have little incentive to try to work up, no adequate plan of promotions is possible, and the civil service cannot be made a career, capable of attracting men of caliber, as it is in England and other European countries.² Unquestionably, such officers as have to do in any important way with policy-framing, *e.g.*, the heads of departments, ought to continue to be selected as now, with a view to harmony with the Administration; and, admittedly, candidates for the higher posts cannot be tested satis-

¹Under executive order of May 10, 1921, open competitive examinations are now carried out in connection with all of the approximately 15,600 postmaster-ships of these three classes, but, of course, only as a preliminary to presidential nomination to the Senate.

²The Civil Service Commission testifies that the number of graduates of higher institutions applying for examination has fallen off greatly, and the lack of opportunity for merited advancement is assigned as a principal reason (*Report*, 1921, p. xxxiv).

factorily in the same way that applicants for admission to the inferior grades of the service are examined. But most of the officials in mind have nothing to do with the determination of policy; and there are well-known and adequate modes of ascertaining the fitness of candidates, no less for places of responsibility in the government service than for positions of trust in great banking and business establishments.¹

Another problem of much seriousness which has only lately been put in process of satisfactory solution is that of proper financial provision for government employees—compensation during service and pensions after retirement. Partly because of a somewhat scornful attitude toward the appointed official or employee as a “feeder at the public crib,” partly because of the decentralized and haphazard method of handling appropriations, Congress never until recent years took seriously the oft-repeated admonition of the Civil Service Commission that a comprehensive, coördinated, and stable salary scale ought to be installed. Speaking broadly, compensation has been sufficiently liberal at entrance into the service; and for this reason, as well as because of the lure of public office and connections, there has ordinarily been little difficulty in recruiting as many beginners as are needed. Compensation higher up in the ranks has, however, been progressively inadequate, at all events within the range of the competitive service, and the rates for the higher technical and supervisory posts have been, in many instances, absurdly low. As a result, able and ambitious young men have been deterred from seeking to enter the service; employees of long standing have found themselves underpaid, in comparison with employees of equivalent experience in private business; and the whole service has suffered in quality and morale. Furthermore, there has been gross injustice, in that by reason of the many separate government services operating under different laws, an employee in one service might be receiving only half as much as an employee in another service with the same title and doing the same kind of work equally well.

¹In its annual reports the Civil Service Commission strongly urges the extension of the classified service to include all positions, with few exceptions, which do not involve the determination of administrative policies, and which are part of the permanent operating force of the government (*Report*, 1921, pp. xii-xiv). Cf. J. A. McIlhenny, “The Merit System and the Higher Offices,” *Amer. Polit. Sci. Rev.*, XI, 461-472 (Aug., 1917). For an illustration of the bad results of the spoils system as applied to superior technical positions, see R. M. Boekel, “The Davis Case,” *Good Government*, XL, No. 10 (Oct., 1923). Other instances are mentioned in the articles by Macmahon cited on p. 295, note 2.

Under the auspices of a joint congressional commission on reclassification of salaries in the departments in Washington, appointed in 1919, and of a separate commission of the same sort on the postal service, a full study of this subject was finally made and a plan of standardization presented to Congress;¹ and in 1923 a Classification Act became law which, although it did not follow the commission's recommendations, was hailed as paving the way for a substantial rectification of salary deficiencies and inequalities.² The measure set up a personnel classification board, to be composed of the director of the bureau of the budget, a member of the Civil Service Commission, and the chief of the bureau of efficiency (or alternates designated by each of these), and it was made the duty of this body to work out an inventory of the government personnel in the District of Columbia, grouping together all positions involving the same duties in any part of the public service and assigning appropriate salary ranges, within the terms of the act, to each class or grade of positions.³ Existing statutory salaries were abolished; regular salary increases in each class and grade were provided for, upon the attainment and maintenance of requisite efficiency ratings, the records of which were to be accessible to the employee; and women were promised equal pay with men for equal work. It was made the duty of the board, furthermore, to carry out a survey of the field services and report to Congress schedules of positions, grades, and salaries for such services, employing the scheme utilized for the District of Columbia in so far as found applicable. Unhappily, the activities of the new board almost immediately became involved in sharp controversy, and the intended improvements have thus far been realized to only a slight extent. An investigation of the situation, indeed, prompted the House of Representatives to pass a bill in 1924 undertaking to suppress the board altogether and to transfer its functions to the Civil Service Commission. The bill did not become law, and the board survives. But the survey of the field services has not been

¹ Report of the Congressional Joint Commission on Reclassification of Salaries, 66th Cong., 2nd Sess., H. Doc. No. 686 (March 12, 1920).

² *U. S. Stat. at Large*, 68th Cong., 4th Sess., Chap. 265; *Fortieth Annual Report of U. S. Civil Service Commission* (1923), 127-135.

³ The act supplied the general framework for the classification, as follows:

Character of service	No. of grades	Salary range
1. Professional and scientific	7	\$1,860 to \$7,000
2. Sub-professional	8	900 to 3,000
3. Clerical, administrative, and fiscal..	14	1,140 to 7,500
4. Custodial	10	600 to 3,000
5. Clerical—mechanical	5	45-50 to 80-90 cents an hr.

made, and, speaking broadly, the country is still without a classification system worthy of the name.¹

CHAP.
XVIII

Pension
system

With a view to meeting the pressing problem of the superannuated employee, Congress in 1920 passed a retirement act (amended in 1926) creating a compulsory part-contributory pension system for all employees in the classified service. The government deducts three and one-half per cent of the salary or other compensation of such employees, and adds to the "civil service retirement and disability fund" thus created such amounts as may be necessary to enable it to pay retiring annuities on a sliding scale fixed in the act. The retirement age for railway postal clerks is sixty-two, for city and rural letter carriers, post-office clerks, and mechanics, sixty-five, and for all other employees, seventy. When an employee reaches the specified age he is automatically separated from the service, unless recommended by his department and certified by the Civil Service Commission for continuance. If he has served less than fifteen years, he gets nothing. But if he has served at least that long, he is entitled to an annuity, ranging, according to the length of his service, from thirty per cent to sixty per cent of his average salary for the last ten years, not to exceed \$1,000 per annum where the period of service has been thirty years or more. There is also provision for annuities for employees who, before reaching the retiring age, and through no fault of their own, become "totally disabled for useful and efficient service." The adoption of this system gave the lower grades of employees a certain amount of assurance against utter dependency in ill-health and old age and brought the United States abreast of the principal European countries in making provision for the multitude of men and women who spend their lives doing the government's routine work with little or no prospect of promotion or other betterment. The annuities are, however, pitifully small; and, even so, the government will have to put in much larger sums than at present to keep the fund on a sound actuarial basis.²

France, Italy, and other European states have at times been

¹ Report of Special Committee on the Personnel Classification Board, 68th Cong., 1st Sess., House Report No. 315 (1925).

² M. Conover, "Pensions for Public Employees," *Amer. Polit. Sci. Rev.*, XV, 350-365 (Aug., 1921); J. T. Doyle, "The Federal Civil Service Retirement Law," *Annals Amer. Acad. Polit. and Soc. Sci.*, CXIII, 330-338 (May, 1924); L. Meriam, *Principles Governing the Retirement of Public Employees* (New York, 1918).

embarrassed, and even endangered, by strikes engaged in by public employees organized in unions and coöperating more or less closely with unionized workmen in private industry. The United States has thus far escaped difficulty of this nature—not because our public employees lack organization, but because their unions are under agreement not to strike against the government and thereby tie up the public services. Organization of federal employees began in the postal service almost forty years ago. Letter carriers organized nationally in 1889, railway mail clerks in 1891, post-office clerks in 1900. At first, these societies, being merely fraternal in their aims, were encouraged and largely controlled by the superior officers of the Post-Office Department. But when, beginning in 1898, they undertook to influence Congress to pass measures raising the scale of pay they lost favor with the authorities; and in 1902 President Roosevelt issued an executive order forbidding all officers and employees, on penalty of dismissal from the government service, “either directly or indirectly, individually or through associations, to solicit an increase of pay or to influence or attempt to influence in their own interests, any other legislation whatever . . . save through the heads of departments, under or in which they serve.”¹ Even after being made more sweeping in 1908, this “gag” rule was not entirely effective. But it stirred so much complaint that in 1912 Congress passed a law unconditionally recognizing the right of federal employees to petition Congress or any member thereof, and also conceding the right of their organizations to affiliate with unions outside of the public service, so long as such relationship does not entail any purpose or obligation to strike.² Framed with reference especially to the postal service, this measure represents the policy of the government in connection with all parts of the civil establishment at the present day.

The organization of employees has gone forward so rapidly that nowadays fully three-fourths of the entire number belong to one sort of association or another. Every important group of postal employees, including even the presidential postmasters, has its national organization, embracing usually ninety per cent of its potential strength. A National Federation of Federal Employees, formed in 1917, links up hundreds of local unions of federal employees, composed of persons engaged in all services exclusive of

¹ *Nineteenth Report of U. S. Civil Service Commission* (1902), 75.

² 37 *U. S. Stat. at Large*, 583.

the separately organized postal branch; and thousands of employees, engaged in mechanical trades, *e.g.*, printers, carpenters, and plumbers, belong to the regular unions maintained by their fellow-craftsmen. Furthermore, all of the postal organizations, the National Federation of Federal Employees, and of course all of the craft unions to which the mechanical employees belong, are affiliated with the American Federation of Labor; although in the case of some of the postal unions the connection is not very close. Acting, as a rule, separately, yet on harmonious lines, and often with vigorous support from the officials of the American Federation, the postal unions and the National Federation petition Congress and lobby among the members in behalf of legislation affecting hours, wages, retirement, and conditions of work; they seek to stimulate popular sentiment favorable to legislative betterment; they confer with the Civil Service Commission and other representatives of the executive branch of the government and seek favorable adjustments of grievances; and they—especially the leaders of the National Federation—do not hesitate to use their influence, and even to “campaign,” against unfriendly congressmen seeking reelection. In this last-mentioned activity they commonly have the backing of the American Federation of Labor; and in the growing tendency of the organizations to turn their power into political channels some observers believe they see an advancing menace.¹

REFERENCES

- R. C. Brooks, *Political Parties and Electoral Problems* (New York, 1923), Chap. xix.
- P. O. Ray, *Introduction to Political Parties and Practical Politics* (3rd ed., New York, 1924), Chaps. xiv-xv.
- E. Kimball, *National Government of the United States* (Boston, 1920), Chaps. ix-x.
- J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chap. ix.
- J. H. Finley and J. F. Sanderson, *The American Executive and Executive Methods* (New York, 1908), Chaps. xvi-xvii.
- J. A. Fairlie, *National Administration in the United States* (New York, 1905), Chaps. iv-v.
- C. R. Fish, *The Civil Service and the Patronage* (New York, 1904), especially Chaps. x-xi.

¹L. Mayers, *The Federal Service*, Chap. xvi; L. D. White, *Introduction to the Study of Public Administration*, Chap. xvii; S. Spero, *The Labor Movement in a Government Industry; a Study of Employee Organization in the Postal Service* (New York, 1924).

- L. M. Salmon, "History of the Appointing Power of the President," *Amer. Hist. Assoc. Papers*, I, No. 5 (1886).
- The Merit System in Government; Report of the Conference Committee on the Merit System* (New York, 1926). Mainly on state and municipal administration.
- L. M. Short, *Development of the National Administrative Organization in the United States* (Baltimore, 1923).
- L. Mayers, *The Federal Service* (New York, 1921).
- , "Some Phases of the Federal Personnel Problem," *Amer. Polit. Sci. Rev.*, XIV, 222-241 (May, 1920).
- F. O. Lowden, "Permanent Officials in the National Administration," *Amer. Polit. Sci. Rev.*, XXI, 529-536 (Aug., 1927).
- A. W. Macmahon, "Bureau Chiefs in the National Administration of the United States," *Amer. Polit. Sci. Rev.*, XX, 548-582, 770-811 (Aug., Nov., 1926).
- L. D. White, *Introduction to the Study of Public Administration* (New York, 1926).
- W. F. Willoughby, *Principles of Public Administration* (Baltimore, 1927).
- A. W. Procter, *Principles of Public Personnel Administration* (New York, 1921).
- L. Meriam, *Principles Governing the Retirement of Public Employees* (New York, 1918).
- W. D. Foulke, *Fighting the Spoilsmen* (New York, 1919).
- E. B. K. Foltz, *The Federal Civil Service as a Career* (New York, 1909).
- J. P. Comer, "Legislative Functions of the National Administrative Authorities," *Columbia Univ. Studies in Hist., Econ., and Public Law*, No. 289 (New York, 1927).
- Annual Reports of U. S. Civil Service Commission* (Washington, 1883 ff.).
- Good Government* (monthly organ of the National Civil Service Reform League).
- Public Personnel Studies* (published monthly by Bureau of Personnel Administration, Institute for Government Research, Washington, D. C.).
- The Public Business* (published bi-monthly by the Better Government League, Washington, D. C.).
- S. Greer, *A Bibliography of Public Administration* (New York, 1926).

CHAPTER XIX

THE OLDER DEPARTMENTS AND THEIR WORK

The preceding chapter set forth certain main features of the executive and administrative parts of the national government: the origin and basis of the departments, the functions of department heads and the relations of these officials with the president, the past and present modes of making selection among candidates for appointment to subordinate offices and employments, and some of the conditions and problems involved in further developing the civil service and in maintaining it on an economical and efficient basis. It is in this field preëminently that we see the government at work. Congress sits intermittently, with an occasional interval of inactivity of as much as eight months. The courts are by no means always in session. But the executive authorities, and especially the administrative services under their control, function, to all intents and purposes, continuously. It is they that bring the national government closest home to the people, and it is largely through the diversification of their activities that the nation is laying its regulating hand upon everyday life and affairs in a fashion to rouse so much comment—not to say protest—in our times. A proper understanding of this side of our government, therefore, requires that we pass the ten great executive departments in review, noting briefly how they are organized, what their functions are, and how they have lent themselves to the steady expansion of public control. Something must be said of the newer modes and means of national supervision and of the ways in which the position of the states has been affected. Certain commissions and other detached agencies—such as the Civil Service Commission already mentioned—form a necessary part of the picture. Finally, various problems of executive and administrative reorganization claim attention as being among the important—at times urgent—questions of public policy.

The first executive department established after the constitution went into effect was a department of foreign affairs, continuing a department of that sort originally created by the Continen-

Importance
of the de-
partments
and their
activities:

1. Depart-
ment of
State

tal Congress in 1781. It soon became desirable, however, to assign to this department certain duties which had no relation to foreign affairs, and hence in less than two months the department was reorganized (September 15, 1789) as the Department of State; and this broader character and title it has ever since borne. The department's main function is, and always has been, to manage, under the president's direction, the official dealings of the United States with foreign nations. But it also performs much of the work undertaken in other countries by a "home department" or ministry of the interior. Thus its head, the secretary of state, officially receives the laws of Congress, promulgates them, and files the original copies for preservation; keeps the great seal of the United States and affixes it to executive proclamations, to various commissions, and to warrants for the extradition of fugitives from justice; proclaims the admission of new states; transmits constitutional amendments as adopted by Congress to the states, receives official notice from the governors of the action taken, and proclaims amendments which have been duly ratified; calls on the governors of the states after a presidential election for authentic lists of the electors chosen and transmits the information to Congress; and performs other similar services as required by law. After the creation of the Department of the Interior, in 1849, certain miscellaneous domestic functions formerly exercised by the State Department were transferred to the new branch, although not in some instances until after considerable delay. Patent administration was so transferred in 1849; the management of census-taking in 1850; the granting of copyrights in 1859; and supervision of territorial affairs in 1873. The department remains, however, to a considerable extent a home office, charged especially with keeping archives and proclaiming public acts and with serving as a medium of communication between the president and Congress on the one hand and the authorities of the states on the other.

Our official spokesman in dealing with foreign nations is the president: he communicates the will of the United States to their governments and, with the consent of the Senate, negotiates treaties with them; he receives their ambassadors and ministers, whose official communications must be made to him and never to the country at large through the newspapers or in other ways. We have seen that in the capacity of supreme director of foreign relations the president may speak to the world, or to a particular na-

tion, through the medium of a message to Congress.¹ Every reader of the newspapers knows that he converses personally with representatives of foreign states who, by invitation or otherwise, call at the White House. And not so long ago we beheld President Wilson conducting foreign relations almost entirely from his own desk, and even going to Europe at the head of a commission charged with the negotiation of a great international settlement. Normally, however, the president acts in foreign affairs through the secretary of state and the subordinate officials of the State Department; and thus it comes about that the department—subject always to presidential check and control—negotiates treaties, carries on correspondence with foreign states, gives instructions to our ambassadors, ministers, and consuls abroad, attends to all matters of extradition, has charge of international tariff relations, issues passports, makes arrangements for international conferences and congresses, gathers information about conditions abroad and places it at the disposal of the president, of Congress, or, if suitable, of the public, and, in general, stands ready to take up any task, in peace or war, which the protection or promotion of American interests beyond our borders entails.

CHAP.
XIX

Numerically, the Department of State is one of the smallest of the ten; but geographically it covers more ground than any other, being, indeed, the long arm of the government that reaches across seas. Like other departments, its mechanism and personnel fall into two main parts, one located in Washington, and the other elsewhere—in the case of the State Department, spread throughout the entire civilized world.² Both the Washington and the field branches have been extensively reorganized in recent years, and are still in a transitional stage which, it is hoped, will before long bring our foreign service abreast of the best in the world.³ The head of the department is, of course, the secretary of state, whose ranking position among his colleagues is recognized by the act which puts him next after the vice-president in line of succession to the presidency.⁴ His is the oldest department; its work is of an exceptionally delicate nature; his relation with the president is

Organiza-
tion of the
department

¹ See p. 261.

² There are some 600 officers and employees in Washington and about 3,700 outside. Of the latter, 13 are ambassadors, 36 are ministers, and 624 are diplomatic secretaries and consular officers.

³ Already it is certainly so on the consular side, and probably so in the secretarial branch of the diplomatic side.

⁴ See p. 203.

peculiarly confidential; except at times when the president chooses, in effect, to be his own secretary of state (as did President Wilson during the war period), he is usually the most conspicuous cabinet officer; and the roster of incumbents of the position since 1789 has contained enough great names—Jefferson, John Quincy Adams, Clay, Webster, Seward, Blaine, Hay, Root, Hughes—to have invested the secretaryship, like the presidency itself, with a lofty tradition.¹

Next in rank to the department head is an under-secretary of state, known until 1919 as the counselor of the State Department. Standing in a position resembling that of a military chief of staff, the under-secretary is prepared to take over temporarily at any time the duties of his superior officer. Next come four assistant secretaries, without numerical designation, each with a staff of trained men and in charge of a group of offices, bureaus, and divisions through which the centralized activities of the department are carried on. The distribution of supervisory functions is quite flexible, being determined at any given time, partly at least, by the experience and aptitudes of the individual assistant secretaries. Under arrangements rather recently effected, ministers and even ambassadors may occasionally be called to Washington for periods of service as assistant secretaries, and, conversely, assistant secretaries are named from time to time for posts abroad. Another important officer in the Washington organization is the solicitor, who handles claims and other matters of a strictly legal nature and has a staff of eighteen assistant solicitors. There is an economic adviser; and finally, there are (a) the chiefs of the office of coördination and review, the visé office, and the office of the executive committee of the foreign service personnel board; (b) the chiefs of the bureau of accounts and disbursing clerk and the bureau of indexes and archives; and (c) the chiefs of ten "divisions," of which four (current information, publications, passport control, and foreign service administration) are general, while six (Latin American affairs, Mexican affairs, Western European affairs, Eastern European affairs, Near Eastern affairs, and Far Eastern affairs) have to do with nations and peoples of particular geographical regions.²

¹J. M. Mathews, *The Conduct of American Foreign Relations*, 41-42.

²The best account of the history and earlier organization of the State Department is G. Hunt, *The Department of State of the United States* (New Haven, 1914). An up-to-date description will be found in J. M. Mathews, *American Foreign Relations: Conduct and Policies* (New York, 1928), Chap.

By far the larger part of the officers and employees of the Department of State are to be found, not in Washington, but in lands beyond the seas—not in the State Department in the narrower sense, but in the separately organized “foreign service” over which it presides. Formerly, these representatives abroad were organized in two distinct services, *i.e.*, diplomatic and consular. Each service had not only its own functions but its own personnel, its own system of recruiting and promotion, its own classification, and its own salary scale; and however much aptitude a member of one service might show for work of the kind performed by the other, it was almost impossible for him to be transferred. For many years the feeling grew that the wall separating the two services ought to be broken down, and after many bills on the subject had failed a measure approved by President Coolidge on May 24, 1924, accomplished the reform.¹ Diplomatic and consular services were consolidated in a common field force known as the “Foreign Service of the United States,” and the diplomatic and consular branches of this service were put on an interchangeable basis so that transfers may be made from one to the other whenever found advantageous. New entrants into the service may be assigned at the discretion of the president to either the diplomatic or the consular branch.² Formerly, there was the difficulty, too, that salaries in the two services were not

CHAP.
XIX

The foreign
service and
its reorgan-
ization

xii. Cf L. M. Short, *Development of National Administrative Organization in the United States*, Chaps. IV, XI. See also C. E. Hughes, “Some Aspects of the Work of the Department of State,” *Amer. Jour. of Internat. Law*, XVI, 355-364 (July, 1922). H. K. Norton, “Our Neglected State Department,” *Century Mag.*, CXIV, 148-157 (June, 1927) discusses the present need of the department for a larger staff and for more generous financial support. The highest—as well as the lowest—officials in the department at Washington are paid less than the men in the field, and often less even than their assistants brought in from the field to help them.

¹ The author of the bill was John J. Rogers, member of Congress from Massachusetts, but almost everything in it had been advocated by recent secretaries of state, leading members of the diplomatic service, and the National Civil Service Reform League. The results of a thorough investigation of the diplomatic and consular services by a special committee of the National Civil Service Reform League in 1918-1919 are set forth in *Report on the Foreign Service* (New York, 1919). On the need of reform see S. MacClintock, “A Unified Foreign Service,” *Amer. Polit. Sci. Rev.*, XVI, 600-611 (Nov., 1922); and on the act of 1924, T. Lay, “Foreign Service Reorganization,” *ibid.*, XVIII, 697-711 (Nov., 1924), and M. Sullivan, “A Quiet Reform in Our Foreign Service,” *World's Work*, LI, 45-52 (Nov., 1925). Cf. A. L. P. Dennis, “The Foreign Service of the United States,” *No. Amer. Rev.*, CCXIX, 178-186 (Feb., 1924).

² The titles of secretary, counselor, consul, etc., through which the foreign status of members of the service is determined, remain as before. For purposes of administration and interchangeability only, the common title of “foreign service officer” is superimposed on the others.

commensurate. Thus a consul-general of Class 1 received a salary of \$12,000 a year, while a counselor of embassy, the corresponding grade in the diplomatic service, received a salary of only \$4,000, which was the maximum for diplomatic officials below the rank of minister. Indeed, it was a matter of common knowledge that members of the diplomatic service, whatever their station, could not expect to live on their salaries—which of course meant that, in effect, the service was closed to all persons not of independent means. The act of 1924 dispensed with the rigid separate classifications and salary scales of the two services and set up a new uniform scheme of nine stipulated classes—designated as first, second, third, etc.—and a uniform salary scale starting at \$3,000 and rising to \$9,000, with an unclassified, subordinate grade from \$3,000 downwards. The first class consists of a dozen or more counselors and secretaries of legations and embassies who hold the most important positions below the rank of minister, together with consuls-general and consuls stationed at the most important posts; the ninth class consists of the newcomers in both branches of the service.

Status of
ministers
and ambas-
sadors

Ministers and ambassadors are not included in the classification. Their salaries range from \$10,000 to \$17,500—decidedly smaller amounts than are paid to officers of corresponding grade in the services of the principal foreign countries. The legislation of 1924 was quite definitely aimed at making it possible for young men of ambition and ability to enter the foreign service as a career, but it left the salaries of ministers and ambassadors unchanged, so that even yet the higher grades of the service are practically barred to persons not of independent means. Meagerness of salaries and failure to provide official residences for American representatives abroad have long stirred comment. An appropriation of ten million dollars in 1926 for the acquisition or erection of embassy, legation, and consular buildings in foreign lands will go some distance toward stopping criticism on the latter score.

Appoint-
ments: the
merit
system

In earlier days, appointments to diplomatic and consular positions, as to places of other kinds, were made by the president and Senate with no assured regard for fitness. Personal favoritism and party services weighed heavily in the selections made. As early as 1895 President Cleveland introduced some elements of a merit system in the consular service, and in 1906 President Roosevelt instituted a plan of competitive examinations and effi-

ciency ratings for the appointment and promotion of consuls of all grades, including consuls-general. In 1909 President Taft started a scheme of competitive examinations in the lower grades of the diplomatic service, with provision for efficiency records as a basis of promotion. This, however, did not affect the members of the service above the rank of secretary, who, accordingly, seldom long outlived the administrations that appointed them and rarely or never survived a change of the party in power. Furthermore, in both services the reforms rested only on executive orders, not on statute. Here again, however, the legislation of 1924 made notable advances. By its terms all persons in the permanent foreign service below the grade of minister are appointed only after examination and a suitable period of probation, and all are entitled to promotion on the basis of merit.¹ The positions of minister and ambassador are not included in the merit system; the president continues free to select men for these posts without reference to previous experience in the service. Many of the best students of the subject believe that this flexibility—this opportunity to choose the highest diplomatic officers from men of standing and achievement in all professions and fields—ought to be maintained. It is gratifying, however, to note that in recent years a steadily increasing proportion of ministerial and ambassadorial appointees have been selected from within the service. The act of 1924, indeed, requires the secretary of state to give the president from time to time the names of members of the service who have demonstrated their fitness for promotion to the grade of minister.

Taken in conjunction with increased allowances for travelling expenses, more liberal arrangements for leaves of absence, and the establishment of a retirement and disability fund for officers in the service² (all provided for in the act of 1924), the changes that have been described mark the greatest advance yet realized toward making the foreign service a career and raising it to a

CHAP.
XIX

The foreign
service as a
career

¹ The act provided for the establishment of a Foreign Service School in the State Department, with a course of instruction running through one year. Most persons admitted to and completing the course receive field assignments as vice-consuls. See E. C. Stowell, "The Foreign Service School," *Amer. Jour. of Internat. Law*, XIX, 763-768 (Oct., 1925).

² This fund is created partly by a five per cent deduction from the basic salary of all foreign service officers eligible to retirement and partly by a contribution from the United States treasury. The age of retirement is sixty-five, and normally the beneficiary must have been in the service at least fifteen years.

level such as it occupies in leading European countries, and such as the best opinion among our own people has long demanded. The consular service has been relatively well paid and, on the whole, has of late been superior to any foreign system. But, speaking broadly, our diplomatic service has ranked low—manifestly because of small pay, lack of reasonable assurance of promotion, and the dry rot of partisan influence. We have still some distance to go before we shall be on a par with Great Britain, France, Japan, and certain other states in this particular. But as now reorganized, our foreign service for the first time constitutes a profession in the same sense as the army and the navy; salaries are not what they should be, nevertheless the service holds out real inducements to men of talent regardless of their means; even in the diplomatic branch, the secretarial officers are at least equal to those of foreign states; and in so far as our presidents henceforth follow the policy of filling ministerial and ambassadorial positions, not with political appointees, but with men who either have come up with distinction through the secretaryships, counselorships, and similar offices or have attained equally desirable qualifications by experience in other fields, an ancient ground of reproach will have been removed. Quite apart from whether we ever join the League of Nations, the commanding position which we have taken since the war, economically and politically, and the ever-growing complexity of our relations abroad, demand not only a suitable but a strong foreign service. To function as it should, the service, in all of its parts, requires the highest ability we can command for it. Not without aptness has it been called our first line of defense.

The duties and activities of both diplomatic officers and consuls are of almost infinite variety; and the lack of any sharp line of demarcation between diplomatic and consular functions renders the recent amalgamation of the services the more logical. Briefly, the duties of diplomatic representatives are (a) to cultivate friendly relations with the authorities of the foreign state to which they are accredited and to keep the way open for quiet and amicable adjustments of matters of controversy, (b) to convey messages and inquiries from the home to the foreign government and to transmit information and replies to the former, (c) to conduct official negotiations, including the drawing up of treaties, (d) to keep the secretary of state and president informed on political conditions and international developments, (e) to watch legislation and other public actions of the foreign state and make protests if treaty stipula-

tions are violated, and (f) to be of general service to traveling Americans, in ways that often tax both ingenuity and patience.¹ Naturally, the stress of diplomatic work is far greater in some capitals than in others, and at times of international discord than in days of peaceful routine.²

The primary function of the American consular officer, at least historically, is to promote the interests of American trade abroad; and to this end he observes and reports on economic conditions in his territory, watches for new and larger openings for American goods, sends back information on the most advantageous advertising, and even the best methods of packing and shipping exported commodities, and puts himself at the service of the American manufacturer, shipper, or commercial traveler engaged in studying the foreign market on the spot. All of this, however, is only part of the story. Indeed, the tendency is for functions of these sorts to pass into the hands of the fast-growing commercial service maintained in foreign lands by the Department of Commerce, notably the commercial attachés and staffs connected with the principal legations; and it is not unlikely that in the course of time the consul will entirely cease to be a "trade promoter"—a development that would be doubly beneficial in that it would give him more time to attend to his other duties and would relieve him of the present suspicion and hostility of business interests in the country in which he is stationed. The other duties which claim his attention are multi-fold and steadily increasing. He certifies the invoices of goods intended for shipment to the United States, and otherwise assists in the administration of our tariff laws. He acts as paymaster of the American government abroad, and also as tax-collector, *e.g.*, in connection with the federal income tax. Under certain conditions, he cares for the estates of Americans who die abroad. He decides disputes between masters, officers, and men on American ships, provides for stranded seamen, and may discharge seamen from their contracts. He inspects, and approves the passports of aliens intending to come to the United States, thus helping enforce our new

¹ One of the best explanations of what it means to be an American ambassador to an important state is contained in B. J. Hendrick, *Life and Letters of Walter H. Page* (New York, 1923-24). See especially Vol. I, p. 159.

² Diplomatic service in general is described in J. W. Foster, *The Practice of Diplomacy* (Boston, 1906), Chaps. I-X, and P. B. Potter, *Introduction to the Study of International Organization* (3rd ed., New York, 1928), Chap. VII. The diplomatic service of the United States as it stands today is described in J. M. Mathews, *American Foreign Relations: Conduct and Policies*, Chaps. XIII-XIV.

immigration quota laws.¹ He acts as "guide, philosopher, and friend" to traveling and necessitous fellow-countrymen. He serves as business agent in securing fuel and stores for American ships. And in some parts of the world, *e.g.*, China, Siam, and Persia, he exercises civil and criminal jurisdiction in cases in which American citizens are involved. The consul is less in the public eye than the minister or ambassador, but he penetrates corners of the earth where diplomacy never reaches and is easily the most useful type of general utility man that modern government and business have developed.²

Under the Articles of Confederation, such limited financial administration as fell within the province of the national government was taken care of by a superintendent of finance, succeeded in 1784 by a treasury board. The vast volume of fiscal business destined to arise out of the financial powers (especially the power to tax) conferred in the constitution on the new government set up in 1789 was not, of course, foreseen. Nevertheless, one of the first necessities was machinery for the collection of taxes, the custody of funds, and the keeping of accounts; and the creation of the Department of State was quickly followed by the establishment of a Department of the Treasury. As has been pointed out elsewhere, the organic statute creating this fiscal department does not use the term "executive;" it requires the head of the department to report directly to Congress, and hence on its face it sets up a presumption against control of the department by the president. But we have also seen that Jackson claimed and exercised a directing voice in the work of this department no less than of the others, and that from his day onwards there has been no real difference of status.³ With the aid of his power of appointment and removal, the president can as readily control policy here as elsewhere.

Starting as a small organization, with fairly homogeneous financial functions, the Treasury Department has developed into a huge administrative establishment, employing more people than any other except the Post-Office Department, and performing tasks,

¹ See p. 529. It is interesting to note that receipts from passport and other fees very nearly cover the entire cost of the State Department.

² On the consular service, see J. M. Mathews, *American Foreign Relations: Conduct and Policies*, Chap. xvii; J. W. Foster, *Practice of Diplomacy*, Chap. xi; and P. B. Potter, "The Future of the Consular Office," *Amer. Polit. Sci. Rev.*, XX, 284-298 (May, 1926).

³ See p. 243.

great and small, of amazingly varied character.¹ From some thirty-eight thousand in 1917, the number of officers and employees rose to more than double that number during the period of our participation in the World War. The figure fell to 51,532 on June 30, 1927; but unless the department's activities should be very greatly curtailed, it will never return to the pre-war level. Even before 1917, the department was subject to exceptionally frequent internal reorganization. During the war there were naturally many changes, and since the armistice there have been at least two extensive redistributions. Under the last of these, carried out by order of the head of the department in 1923, supervision of the administrative units is apportioned among an under-secretary (with five assistants) and three assistant secretaries, one of the latter being in charge of fiscal offices, one in charge of "foreign loans and miscellaneous," and one in charge of the collection of revenue. The under-secretary acts for, and by direction of, the secretary in any branch of the department and represents him in dealings with sundry outside agencies such as the Federal Reserve Board.

The work of the department falls into two general divisions, one financial and the other non-financial. The first important financial activity is the collection of the national revenue. The principal sources of revenue and their yield will be explained in a later chapter.² Suffice it to say here that practically all income of the national government, except from the postal service, is gathered by two great branches of the Treasury Department, namely, the customs service and the internal revenue service. The customs service collects the duties on imports provided for by the tariff laws, amounting now to more than six hundred million dollars a year.³ The work is performed at some three hundred "ports of entry," grouped in forty-seven customs collection districts; and a large staff of collectors, surveyors, and appraisers is required. A "customs service" in the Treasury Department is in immediate charge of a commissioner of customs, supervised by one of the assistant secretaries. The internal revenue service collects the federal income tax, estate taxes, capital stock taxes, occupational taxes, tobacco taxes, amusement taxes, and sundry other imposts, aggregating considerably more than half of the total national income. For

CHAP.
XIX

Financial
functions:

(1) Collec-
tion of
revenue

¹ For a diagram of the present organization of the Treasury Department see p. 487 below.

² Chap. xxvi.

³ L. F. Schmeckebier, "The Customs Service," *Service Monographs of the U. S. Government*, No. 33 (Baltimore, 1924).

internal revenue purposes, the country is divided into sixty-five districts, each in charge of a collector, with the requisite staff of revenue agents and other assistants. The central organization in Washington is presided over by a commissioner of internal revenue, whose immediate superior is the assistant secretary in charge of revenue collection.¹

(2) Custody of funds

A second main financial function of the department is keeping the government's money and paying its bills in accordance with appropriations duly made. There is a treasury (in the physical sense) in Washington, in whose vaults large sums are held; and until 1921, there were sub-treasuries in nine other principal cities. Government money has also long been placed in banks, and since the discontinuance of the sub-treasuries most of it is so deposited, principally in the federal reserve banks located in twelve cities carefully chosen with reference to the needs of business.² The treasurer of the United States is in general charge,

(3) Control of the currency

A third important financial function is the control of the currency. The bureau of engraving and printing prepares all the paper money, as well as the bonds and other securities, of the national government; the bureau of the mint supervises the mints, where the coined money is produced, and the assay offices;³ the bureau of secret service guards the currency against counterfeiting; the comptroller of the currency supervises the national banks, directs the periodic examinations of them and receives their reports, and prepares and issues the national bank circulation.

(4) Preparation of the budget

Finally,⁴ a budget bureau in the Treasury Department prepares the yearly budget for the president, and thereby wields effective control over fiscal policy. Formerly, the department had no definite functions at this point comparable with the functions of the English Treasury or the ministry of finance in leading Continental countries, and on this account our system was, as is explained elsewhere, notably defective. But a budget and accounting act of 1921 set up a bureau of the budget in the Treasury Department and required it to make up, every year, on the basis of estimates received from the several departments, a budget for the ensuing

¹L. F. Schmeckebier and F. X. A. Eble, "The Bureau of Internal Revenue," *Service Monographs*, No. 25 (Baltimore, 1923).

²See p. 513.

³J. P. Watson, "The Bureau of the Mint," *Service Monographs*, No. 37 (Baltimore, 1926).

⁴For the relation of the department to the federal farm loan system see p. 517.

fiscal year. The first budget thus prepared (for the fiscal year ending June 30, 1923) was presented to Congress by President Harding in December, 1921.¹

CHAP.
XIX

Early in its history, the Treasury Department began to be assigned functions which had little or nothing to do with finance, and for a long time it served as a dumping ground for offices and activities which Congress did not know how to dispose of otherwise. Until 1829, it supervised the postal service; from 1812 to 1849, it contained the general land office; numerous duties pertaining broadly to commerce were imposed on it until, in 1903, the Department of Commerce and Labor was created. Various special and non-financial tasks fell to it during the period of the World War. Even yet, its activities are more varied than those of most other departments. The bureau of public health frames and enforces regulations for the prevention of the introduction and spread of communicable diseases, supervises the national quarantine service, and carries on scientific research in public health and hygiene.² The supervising architect superintends the construction and repair of public buildings. The coast guard renders assistance to vessels in distress and destroys or removes wrecks, derelicts, and other floating dangers to navigation. A prohibition unit of the bureau of internal revenue, charged with enforcement of the national prohibition act of 1919 commonly known as the Volstead Act, was in 1927 erected into a distinct prohibition bureau, which, on June 30 of that year, had a total of 4,286 employees.³

Non-fin-
cial func-
tions

Following approximately the chronological order of establishment, the next two departments are those having to do with the fighting services, *i.e.*, the War Department and the Navy Depart-

3. War
Depart-
ment

¹See p. 504 ff. The act of 1921 abolished the hitherto important offices of comptroller and assistant comptroller of the treasury, withdrew the six auditors from the department, and provided for an independent audit of government accounts under a general accounting office, presided over by a comptroller-general and independent of all of the executive departments. D. H. Smith, "The General Accounting Office," *Service Monographs*, No. 46 (Baltimore, 1927). Although attached to the Treasury Department, the budget bureau is largely independent of it. The best account is W. F. Willoughby, *The National Budget System* (Baltimore, 1927).

²L. F. Schmeckebier, "The Public Health Service," *Service Monographs*, No. 10 (Baltimore, 1923); R. D. Leigh, *Federal Health Administration in the United States* (New York, 1927), *passim*.

³The historical development of the Treasury Department is fully described in L. M. Short, *Development of National Administrative Organization in the United States*, Chaps. vi, xii. Cf. J. A. Fairlie, *National Administration of the United States* (New York, 1905), 92-132. On the activities of the department, see annual *Report of the Secretary of the Treasury on the State of the Finances*.

ment. The War Department dates from 1789.¹ Its primary function is, of course, the management of affairs pertaining to the army. Through various bureaus it sees to the enlistment and equipment of men for all branches of the service, provides munitions, contracts for supplies, transports troops, erects and mans coast defenses and other fortifications, supervises the militia, protects the health of the soldiers, and directs the training of young men at the National Military Academy at West Point. The department is organized in five divisions and eleven military bureaus; although changes are frequent, especially in time of war. As in Great Britain, but not always in Continental states, the head of the department is a civilian, not a military man. He is therefore selected as a general administrator, not as an expert on military affairs; and for guidance in the technical work of the department he is supposed to rely on the military officers in the various bureaus, and especially on the General Staff, created in 1903 to prepare plans for national defense, and for the mobilization of the troops, to suggest improvements in the military establishment, and to give professional advice to the secretary of war and to the president as commander-in-chief. Ultimate civil control over all the activities of the department is secured by constitutional provisions making it impossible to raise forces or spend money except by authority of Congress.

The
armed
forces

Having no dangerous neighbors on her borders, and being remote from the scenes of Old World conflicts, the United States has always maintained a relatively small standing army. Entrance into world politics in a more active way after 1898 led to some increase of the forces, but even in 1915 the authorized strength of the "regular army" was only 98,000 officers and men. The extraordinary effort of the World War brought under arms a total of more than 3,700,000 (including the marines). But after the armistice, the number was rapidly reduced again, so that on September 30, 1926, the actual strength of the regular army stood at 11,871 commissioned officers and 118,216 enlisted men—a total of 130,087. This force is, in peace time, recruited from volunteers, serving for one year or three years at their option, and is officered chiefly by graduates of the National Military Academy at West Point.

¹There was a similar department during the period of the Confederation, and Washington reappointed its head, General Henry Knox, head of the new department under the constitution.

Under terms of the Army Organization Act of June 4, 1920, the military forces of the country include, in addition to the regular army, (1) the National Guard—once known as the “militia”—and (2) the Organized Reserves. The National Guard, as organized in each of the states and territories and the District of Columbia, consists of volunteers enlisted for three years. Locally appointed officers are in immediate charge, but national standards are prescribed and enforced, the officers and men are paid out of the national treasury, and they are liable to be called at any time into national service.¹ The Organized Reserves consist of a reserve corps of enlisted men, and also an officers’ reserve corps whose members receive their training principally while students in colleges and universities and at summer encampments held annually under the direction of the War Department. Unlike the National Guard, which is partly state and partly federal, the Organized Reserves is a purely federal force. In a war of any magnitude, it would constitute the major component of the effective army. The members have a war obligation only. In time of peace, they may be called out for training, but not for longer than fifteen days a year except with their own consent. The theory of the arrangement is that the war force, over and above the standing army, required for immediate mobilization in the event of emergency, is to be constituted and trained in time of peace and composed of qualified persons who have enlisted voluntarily.²

Until 1798, the War Department administered naval affairs, and until 1849, Indian affairs; and it has today two important functions of a non-military character, *i.e.*, the construction of public works and the administration of the insular possessions. Under a chief engineer, the corps of engineers dredges and improves rivers and harbors, builds dams and reservoirs required in the reclamation of arid lands, and carries out any other engineering projects which Congress authorizes, the most notable as yet being the building of the Panama Canal. All navigable waters of the United States are under the War Department’s jurisdiction, and no bridge, pier, or other possible obstruction to navigation, can be erected until the department’s consent has been obtained. European nations which possess outlying dependencies invariably have a ministry of colonies. The United States, however, has

¹ There is also a National Guard Reserve.

² J. W. Weeks, “Our New Army of the United States,” *Rev. of Revs.*, LXV, 285-290 (Mar., 1922).

never established such a department, and the administration of territorial, or colonial, affairs has been variously assigned to the departments of State, War, Navy, and Interior. At present, Alaska and Hawaii are supervised by the Department of the Interior; the Philippines, Porto Rico, and the Panama Canal Zone, by the War Department; and a few minor possessions by the Navy Department. The bureau of insular affairs was organized in the War Department in 1898 to take charge of matters of civil government in the islands acquired from Spain;¹ and nowadays it receives the reports of the governors and other authorities, audits the insular accounts, purchases and transports supplies for the insular governments, and has charge of appointments in the United States to the Philippine civil service.²

4. Navy
Depart-
ment

The Navy Department was created in 1798, at the time of the threatened war with France. Unlike most other departments, it has always had but one important function and, accordingly, an unusually unified, symmetrical organization. Its various activities—the construction and upkeep of war craft, the enlistment of men, the manufacture or purchase of arms and equipment, the making of contracts for supplies, the organization and movement of the fleets, the control of naval hospitals and hospital ships, and other work connected with keeping the fighting forces on sea at their maximum efficiency—are carried on through about a dozen coördinate bureaus; and the department head, being, as in the case of the secretary of war, a civilian, is advised by a General Board consisting of important naval officers, and by certain other more specialized boards. By somewhat logical arrangement, the department administers the affairs of Tutuila (in Samoa), Guam, and the Virgin Islands, whose importance consists chiefly in their serviceableness as naval stations. It also has charge of the Naval Academy at Annapolis and the Naval War College at Newport.

The naval
forces

Physically, the navy consists of battleships, cruisers, submarines, and various kinds of auxiliary craft provided for by act of Congress. The end of the World War found the United States with a great navy afloat, a still more powerful one on the stocks in the

¹ This bureau was at first known as the division of customs and insular affairs. It became the division of insular affairs in 1900 and the bureau of insular affairs in 1902.

² H. B. Learned, *The President's Cabinet*, Chap. 1. On the history of the War Department, see L. M. Short, *Development of National Administrative Organization in the United States*, Chaps. v, xii.

course of building, and the scepter of sea supremacy within her grasp. At the Washington Conference on the Limitation of Armaments in 1921-22, however, the leading naval powers agreed that until 1936 there shall be a fixed ratio in capital ships which places the United States simply on an equality with Great Britain;¹ and Congress now authorizes building subject to this understanding. The enlisted men of the navy are volunteers and the officers are mainly graduates of the Naval Academy. An important subsidiary, dating, indeed, from 1775, is the marine corps, organized to supply the navy with trained infantry for land fighting or other duty. This interesting, and even picturesque, force is held in readiness to be dispatched, in detachments, at any time to any part of the world where Americans are to be protected, disorders suppressed, or patrol duties performed. Detachments have been used repeatedly in recent times in the Caribbean countries and in the Far East; while in the World War—from Belleau Wood onwards—the corps, recruited to an emergency strength of almost eighty thousand, rendered valiant service. The actual strength of the navy in 1926 was 5,422 line officers, 83,250 enlisted men, and 17,985 marines.²

CHAP.
XIX

During the World War and after, aviation became a major phase of offensive and defensive plans and operations, and in our own country important air services have been built up in connection with the army, the navy, and also the postal establishment. In 1926 there were 9,720 officers and men in the army air service and 4,547 in the naval air service. An aeronautical board has been set up to promote coöperation and coördination between the two services. Each service, however, is administered independently in a bureau of the department to which it is attached, and proposals to consolidate army, naval, and postal aircraft activities in a new executive department of aeronautics, on the plan of the British air ministry, have been regarded very unfavorably by department heads and by the president. It may be added that a proposal for consolidation of the War and Navy departments into a single department of defense has been viewed similarly in high official circles, on the ground that the small economies effected in time of peace would not compensate for the loss of mobility and dispatch in time of war. There is, however, an army and navy joint board which

Air
forces

¹ For every five battleships possessed by the United States, Great Britain is to have five, Japan three, and France and Italy approximately two each.

² L. M. Short, *Development of National Administrative Organization in the United States*, Chaps. VII, XIV.

advises the heads of the two departments upon matters having to do with coördination of the defense services.

Following English and Colonial precedent, Congress provided in the Judiciary Act of 1789 for an attorney-general who should advise the government on legal matters and represent it in judicial proceedings. This officer was not expected to give all of his time to the work, and he was not made the head of a department, although as soon as the cabinet developed he was received into the group. With the growth of the country and of the government's activities, the duties of the position naturally increased. Solicitors and other assistants were provided for; the attorney-general gave up all private practice; and at last, in 1870, under pressure of the great volume of legal work flowing from the Civil War and Reconstruction activities, Congress belatedly established a Department of Justice in which the government's legal business was for the first time brought together and systematized. In number of officers and employees, the Department of Justice is smaller today than any other. But it performs exceedingly important functions, and no department, except perhaps the Treasury, is so interlocked with the others. The principal officers in Washington are the attorney-general, who gives his time mainly to studying and rendering opinions on legal questions referred to him by the president or heads of departments; a solicitor-general, who represents the United States before the courts; an assistant to the attorney-general, who has special charge of cases arising out of the national anti-trust and interstate commerce laws; seven assistant attorneys-general, with such duties as are assigned to them by the head of the department; solicitors for the departments of State, Treasury, Commerce, and Labor;¹ and a director of the bureau of investigation, whose activities parallel and supplement those of the secret service in the Treasury.

Outside of Washington the department has a district attorney and a marshal in each of the eighty-two judicial districts into which the country is divided, besides others in Alaska, Hawaii, Porto Rico, and the Panama Canal Zone. Both offices date from 1789. The attorneys represent the United States in suits brought

¹ These solicitors and their staffs are officially in the Department of Justice, although they do no work for it. A bill which would have removed them to the departments which they respectively serve—as the solicitor for the Post-Office Department was removed in 1923—failed in 1925. The office of solicitor for the Interior Department was discontinued by legislation of 1926.

in the district courts, to which the United States is a party, and prosecute violators of national laws; the marshals serve writs, summon jurors, protect judges against violence, and execute court orders and decisions. All are appointed by the president and Senate for a term of four years. There are assistant attorneys and deputy marshals, and private legal aid is sometimes employed. The work of this field force of the department is, of course, supervised from Washington, and rather more closely, in the nature of things, than the outlying services in some other departments.¹

Two main duties fall to the officials of this department. The first is to give opinions to the president and the other principal officers of the government on questions touching their duties and involving construction of the constitution or the laws. The courts will answer such questions only in deciding actual cases and cannot be looked to for immediate rulings on the constitutional and legal matters that come up almost daily in the carrying on of the government's work. For these the officials concerned are dependent upon the attorney-general and his principal assistants at the national capital. In many instances, the opinions rendered are final and conclusive, and hence determine the law; and sometimes they profoundly influence the political, as distinguished from the purely legal, policies of the government. Opinions are published, after the manner of judicial decisions, and they acquire weight as precedents in a similar way. They are not furnished to Congress or its committees, but only to the executive; nor are mere departmental regulations thus construed, or abstract or hypothetical questions answered.

The second main duty of the department is to supervise or conduct suits to which the United States is a party and to prosecute offenders against the revenue, currency, commerce, banking, postal, and other national laws. Suits begun by the government are brought before a district court or the Supreme Court, according to the nature of the case; and while suits against the government are not allowed as a matter of right, they are in fact permitted, and are instituted in a district court, or in the special Court of Claims. In the lower courts the government, whether plaintiff or defendant, is commonly represented by the district attorney of the district in which the action is begun; in the Supreme Court and

¹ It should be emphasized that the Department of Justice and the judiciary are quite separate. The former has nothing to do, legally, with the creation of courts, the appointment or removal of judges, or the regulation of judicial procedure.

Court of Claims, by the attorney-general or one of his principal assistants, usually the solicitor-general, or, in trust cases, the assistant to the attorney-general. Two minor, although not unimportant, functions of the department are the advising of the president on requests for pardons¹ and the administration of the federal penitentiaries at Atlanta, Leavenworth, and McNeil Island, and of the jail and reform schools in the District of Columbia.²

Although nation-wide postal establishments operated by government authorities do not go back very far historically, the services rendered by such agencies are nowadays considered prime necessities; and the postal system of the United States has become not only the most extensive in the world, but probably the largest business enterprise in which any government has ever been directly concerned. The Post-Office Department, by which this system is administered, came into existence in a roundabout way. It was not recognized by statute as a coordinate executive department until 1874. But to all intents and purposes it enjoyed that status from 1825, when the term "Post-Office Department" was first used in the title of an act of Congress, and even more clearly from 1829, when on the initiative of President Jackson the postmaster-general became a member of the cabinet. The postal establishment, however, was an inheritance from earlier times. The colonies had local postal systems and something of a general system as well; there was a general post-office under the Confederation; and after 1789 a post-office establishment, under a postmaster-general, was, as a branch of the revenue, attached to the Treasury Department. This last arrangement followed the practice in Great Britain, where, to this day, the postal system, being officially regarded as a revenue-producing enterprise, is organized and administered as a branch of the Treasury.

One who desired to portray the amazing development of the United States in the past hundred and forty years could hardly do so more effectively than in terms of the growth of the postal

¹ See p. 255.

² On the attorney-generalship, see H. B. Learned, *The President's Cabinet*, Chap. vii, and L. M. Short, *Development of National Administrative Organization in the United States*, 184-195; and on the Department of Justice in general, Short, *op. cit.*, Chap. xv, and A. Langeluttig, *The Department of Justice of the United States* (Baltimore, 1927). An interesting popular account is J. M. Beck, "The World's Largest Law Office," *Amer. Bar Assoc. Jour.*, X, 340-342 (May, 1924).

system. One could cite the fifty thousand post-offices and nearly forty-five thousand rural delivery routes now in operation, serving twenty-five million people; the receipts of \$683,000,000 in 1927 as compared with \$280,000 in 1800; the million and a half letters mailed every hour of the day from one end of the year to the other; the 309,000 employees, comprising considerably more than half of the entire executive civil service. But even more striking would be the facts relating to the expansion of functions and activities which has made the Post-Office the department whose operations come closest home to the great mass of the people. High points in the recital would be the introduction of the registration system in 1855, the beginning of urban free delivery service in 1863, the establishment of the money order system in 1864, the beginning of rural free delivery service in 1896, the introduction of the postal-savings system in 1911, the starting of the parcel-post system in 1913, and the launching of an air mail service in 1918.

CHAP.
XIX

A word only can be said about two or three of these more recently undertaken services. The introduction of the postal-savings system in 1911 followed prolonged agitation in favor of a plan under which savings could be deposited at designated post-offices and draw interest at a moderate rate. The arguments advanced were chiefly that large sections of the country were inadequately provided with savings banks; that extensive use of postal-savings banks would be made by the foreign-born, who had been accustomed to such institutions in Europe and were distrustful of our ordinary banks; that the postal-savings banks could be utilized to provide a market for United States bonds; and that their existence would encourage the people generally in thrifty habits.¹ Experience amply justified the decision made. Beginning modestly in 1911, the system was extended within a decade to practically all parts of the country; on June 30, 1927, postal-savings deposits were being received at 6,672 depositories, and there were 411,394 depositors, with deposits and accrued interest aggregating \$151,389,767.² Deposits are received in as small amounts as one dollar and may be made in such sums as will not yield a balance exceeding \$2,500 per person at any one time; and interest is paid at a

Postal
savings

¹ G. von L. Meyer, "Postal-Savings Banks," *No. Amer. Rev.*, CLXXXVIII, 248-253 (Aug., 1908), and "The Need of Postal-Savings Banks," *Rev. of Revs.*, XXXIX, 47-48 (Jan., 1909).

² *Annual Report of the Postmaster-General* (1927), 53, 102.

rate of two per cent.¹ Deposits, too, are exchangeable for postal-savings bonds in denominations of twenty dollars and upwards, bearing interest at two and one-half per cent, which may be held in any amount.

After long opposition on the part of the great express companies and small retailers, Congress, in 1912, passed an act which authorized the Post-Office Department to engage in the express business; and this new service was inaugurated in 1913 as the parcel-post system. During the first year more than four hundred million parcels were handled, and the annual business has now been multiplied several fold. The benefit of this service accrues principally to the millions of people living in outlying agricultural districts. But there are no considerable classes that do not profit by it almost daily. In addition to the domestic parcel-post, the United States has international parcel-post agreements with all important European nations, with Brazil, Japan, and other widely scattered countries.

By all odds the most noteworthy of recent postal developments has been the building up of an extensive and rapidly growing air mail service. After considerable study and a number of occasional flights with mail by exhibition aviators, a regular and dependable air mail service was inaugurated between Washington and New York in 1918. The service was extended to include New York-to-Cleveland and Cleveland-to-Chicago routes in 1919, and in 1920 increased appropriations permitted extensions via Chicago to Minneapolis, Omaha, St. Louis, and eventually San Francisco. Retrenchment followed, on account of shortage of funds, and in 1924 no routes were in operation except a series linking New York and San Francisco. The practicability of the service had, however, been demonstrated and a live popular demand created; and in 1927 the Post-Office Department was at last able to embark upon the policy toward which it had been working from the first, namely, the letting out of air-mail carriage to private commercial corporations. Bids were received for service on various prescribed routes, contracts were awarded, and before the close of the year government operation came entirely to an end, thus placing the carriage of mail by airplanes upon the

¹ Indeed, amounts less than one dollar may be saved by purchasing postal-savings stamps at ten cents each. In his annual report for 1927 the postmaster-general strongly recommended that the maximum balance allowed be increased from \$2,500 to \$5,000.

same basis as that by railroads. On June 30, 1927, eight contract routes were in operation. Others have been put in operation since, contracts have been awarded for several more, and ere long the network will extend to all major cities (with service for hundreds of lesser ones en route) in the country. A flat rate of ten cents for each half-ounce or fraction thereof between any two points in the country, without regard to distance, has been adopted, appreciably increasing the volume of business. The Department of Commerce has been made responsible for the provision of lighted airways and emergency landings, and it proposes to install beacon lights for night flying in all sections of the country, in the same way that lighthouses for ships on the high seas and in coast waters are maintained.¹

CHAP.
XIX

The Post-Office Department is administered by a postmaster-general, who, not unnaturally, is frequently selected with a view to his experience in managing a great business, *e.g.*, John Wanamaker; or, at all events, conducting large enterprises, not excluding, as in the case of Will H. Hays, national political campaigns. Each of four assistant postmasters-general has charge of a branch of the department, which in turn is organized in divisions under superintendents or chiefs; and there are other general departmental officers, including the usual chief clerk, a solicitor, and five assistant attorneys. The bulk of the department's work is done, of course, throughout the country, in collecting, assorting, transporting, and delivering mail (including parcels of merchandise), receiving and caring for savings, transferring money under the money order system, and enforcing the laws against lottery schemes and swindlers. Extension of rural delivery service to large parts of the country has made possible the abandonment of thousands of small post-offices. Nevertheless, the total number on June 30, 1927, was 50,458.² These are divided into four classes, according to annual receipts, the fourth class including all whose receipts are under \$1,500, or about sixty-nine per cent of the total number. As has been pointed out, all fourth-class postmasters, together with the great body of lesser employees of other types, are now included in the classified competitive service. Postmasters of the other three classes, numbering 15,651 on June 30, 1927, are still appointed by the president and Senate, with such restraints upon political

Depart-
mental or-
ganization

¹ *Annual Report of the Postmaster-General* (1927), 22-29. Cf. B. M. McConnell, "The Air Mail Service Makes Good," *Rev. of Revs.*, LXXI, 301-306 (Mar., 1925).

² The maximum number, reached in 1901, was 76,945.

and other undesirable appointments as flow from a system of tests employed voluntarily by the president in selecting nominees.¹

It has been stated that the postal establishment was at one time thought of as a revenue-producing agency, as it still is in Great Britain. That notion, however, was long ago given up. For a hundred years the most that was attempted was to make the service pay its way, and during long stretches of time—indeed, almost continuously between 1830 and 1910—it failed to do even that. When the United States entered the World War, in 1917, postal rates were, indeed, deliberately pushed up to such a level as to yield the government a clear profit. But they were lowered again, in 1919, as soon as the emergency passed; and deficits promptly reappeared. During the fiscal year ending June 30, 1927, expenditures exceeded revenues by more than sixteen million dollars, and losses were incurred on all activities except carriage of first-class mail and administration of postal savings.² The mode of relief is a perennial question. Something could be gained by reducing the dead loss arising from handling the present large quantities of “franked” matter (over four hundred million pieces in 1927); and certain other economies could be introduced. But the necessity of maintaining the service over large areas where the returns are bound to be small and the enormous transportation costs, entailed by the sheer size of the country, set up conditions under which it is almost too much to expect the service to pay for itself. A postal-pay and rate-increase act, approved February 28, 1925, did, indeed, readjust rates so as to yield additional revenue to an estimated amount of sixty millions a year. But it also increased the compensation of postal employees by an amount aggregating sixty-eight millions a year; so that the annual balance on the wrong side of the ledger continued very much as before. In future years it may have to be frankly recognized that a government service of the nature of the postal establishment cannot be expected to pay its way in the literal sense of bringing in as much in dollars and cents as is spent on it.

¹ See p. 296. On the postmaster-generalship and the organization of the department, see L. M. Short, *Development of National Administrative Organization in the United States*, Chaps. VIII, XVI, and H. B. Learned, *The President's Cabinet*, Chap. IX. The postmaster-general is the only department head who has a fixed term, i.e., four years; all others remain in office at the will of the president.

² The “operating deficit,” produced partly by undischarged obligations carried over from the previous year, was, however, \$28,914,716.

Indeed, the post-office is the only major government service upon which such a demand is any longer made.

REFERENCES

- L. M. Short, *Development of National Administrative Organization in the United States* (Baltimore, 1923), Chaps. II-VIII, XI-XVI.
- J. A. Fairlie, *National Administration of the United States* (New York, 1905), Chaps. VI-XII.
- H. B. Learned, *The President's Cabinet* (New Haven, 1912), Chaps. IV-IX.
- J. M. Mathews, *American Foreign Relations: Conduct and Policies* (New York, 1928), Chaps. XIII-XVIII.
- J. W. Foster, *The Practice of Diplomacy* (Boston, 1906), Chaps. I-XI.
- F. Van Dyne, *Our Foreign Service* (Rochester, 1909), Chaps. I-III.
- G. Hunt, *The Department of State of the United States* (New Haven, 1914).
- T. Lay, *The Foreign Service of the United States* (New York, 1925).
- S. F. Bemis (ed.), *The American Secretaries of State and their Diplomacy* (New York, 1927—). The three vols. thus far published conclude with James Monroe.
- J. P. Hill, *The National Executive* (Boston, 1916).
- F. J. Haskin, *The American Government* (new ed., Philadelphia, 1923). A popular but informing account.
- D. R. Dewey, *Financial History of the United States* (8th ed., New York, 1922).
- J. A. Tobey, *The National Government and the Public Health* (Baltimore, 1926).
- R. D. Leigh, *Federal Health Administration in the United States* (New York, 1927).
- J. S. Easby-Smith, *The Department of Justice, its History and Functions* (Washington, 1904).
- A. Langeluttig, *The Department of Justice of the United States* (Baltimore, 1927).
- L. D. Ingersoll, *History of the War Department of the United States* (Washington, 1880).
- W. H. Carter, *The American Army* (Indianapolis, 1915).
- R. W. Neeser, "The Department of the Navy," *Amer. Polit. Sci. Rev.*, XI, 59-75 (Feb., 1917).
- F. L. Paxson, "The American War Government, 1917-1918," *Amer. Hist. Rev.*, XXVI, 54-76 (Oct., 1920).
- W. E. Rich, *History of the United States Post-Office to the Year 1829* (Cambridge, 1924).
- D. C. Roper, *The United States Post-Office* (New York, 1917).
- E. W. Kemmerer, *Postal Savings; History and Critical Study of the Postal-Savings System of the United States* (new ed., Princeton, 1926).
- Service Monographs of the United States Government* (as cited in footnotes).
- The United States Daily* (Washington).
- Annual reports of the heads of the several departments, transmitted at the convening of Congress in regular session in December (obtainable through the Superintendent of Documents, Washington).

CHAPTER XX

THE NEWER DEPARTMENTS—PROBLEMS OF ADMINISTRATIVE REORGANIZATION

7. Interior
Department

Gouverneur Morris proposed in the constitutional convention of 1787 that the principal officers of state should include a "secretary of domestic affairs," who should "attend to matters of general policy, the state of agriculture and manufactures, the opening of roads and navigations, and the facilitating of communications through the United States." Curiously enough, practically all of these functions are now performed elsewhere than in the "home" department which the Pennsylvania member had in mind. They and others like them have, however, forced the creation in later days of not only the proposed home department, but three other departments having to do specially with agriculture, commerce, and labor, not to speak of numerous independent boards and commissions.

Established
in 1849

Efforts were made to procure the establishment of a home, or interior, department by the first Congress in 1789. The decision, however, was not to set up a separate department of the kind, but instead to turn over such duties as would have been appropriate to it to the Department of Foreign Affairs, which, as we have seen, was thereupon rechristened the Department of State; and other such functions were subsequently assigned, with no particular logic, to the Treasury Department and the War Department. In the course of a generation, the expansion of the country and the growth of governmental activities made a new department highly desirable. Madison advised in 1816 that such a department be created, and a bill for the purpose was considered, although without result, in 1817. John Quincy Adams and Andrew Jackson managed to agree in supporting the plan. It was only in 1849, however, after the need had been freshly emphasized by the annexation of vast stretches of former Mexican territory, that the necessary legislation could be obtained; and even then Calhoun and other southern men strongly opposed the step, on the ground that it would lead to encroachment by the national government upon the powers

held to be reserved to the states. President Polk signed the bill, but confided to his diary that he had done so with reluctance, fearing its "consolidating tendency."¹

CHAP.
XX

The organic act did not expressly provide that the secretary of the interior should be subject to the direction of the president; in that respect it resembled the measures creating the Treasury Department and the attorney-generalship. And under normal conditions the president will follow more closely the work of departments having to do with foreign relations, national defense, and finance. Of the full right of presidential control over the affairs of the Interior Department, however, equally with those of all other departments, there is not a shadow of doubt. There are two assistant secretaries, each in general charge of a group of bureaus and offices, of which there are nine of principal importance, in addition to a varying number of minor administrative officers and boards. As in the Treasury Department, chiefs of major subdivisions enjoy an exceptional degree of independence, being subject only to supervisory and appellate powers of the department head.² For a number of years, however, a reorganization of the department has been in progress, resulting not only in substantial economies, but in better coördination and increased efficiency.

Present or-
ganization

In European countries, notably France, the ministry of the interior is charged mainly with the supervision of local government and administration. In the United States this function falls to the several state governments, and the national Interior Department takes care, rather, of a varied assortment of interests and activities which, in most cases, have little or no relation to the work of state and local authorities. One may add that these interests and activities, by reason of their great diversity, often have, and must have, little or no relation to one another. Four main administrative agencies were transferred to the department when it was established, *i.e.*, the general land office from the Treasury Department, the patent office from the State Department, and the pension office and office of Indian affairs from the War Department.

Functions

¹ One frequently hears nowadays the same objection to the proposal to establish a national department of education, or of education and health. The title of the act of 1849 used the term Home Department, but the body of the measure substituted Department of the Interior, and the latter name is always used, both officially and popularly. On the origins of the department, see H. B. Learned, *The President's Cabinet*, Chap. x, and L. M. Short, *Development of National Administrative Organization in the United States*, Chap. ix.

² Short, *op. cit.*, Chap. xvii.

A bureau of education was added in 1869, the geological survey in 1879, the reclamation service in 1902, the bureau of mines in 1910. At various dates the department was given charge of the territorial governments of Alaska and Hawaii, administration of the national parks and monuments, and control of certain hospitals. Some functions once belonging to it have been taken away: for example, the recording of copyrights¹ was given over to the librarian of Congress in 1870, after having been attended to in the Interior Department for eleven years; the census office, established as a permanent bureau in 1902, was transferred to the new Department of Commerce and Labor in the following year; and the patent office and bureau of mines were removed to the Department of Commerce in 1925. Several other transfers are proposed by the authors of reorganization plans.² But the department is still one of exceptionally varied, as well as unusually interesting, activities.

If one were to attempt to single out the most important object toward which the department's energies are directed, it would undoubtedly be found to be the exploration, measurement, development, allocation, and conservation of the country's natural resources. Not all of the agencies employed for this purpose are located in the Interior Department.³ Nevertheless, here one finds the general land office, the bureau of reclamation, and the geological survey, not to mention the national park service and the Alaska Railroad (formerly the Alaska engineering commission). The administration of public lands has always been one of the government's largest tasks. Most of the territory of the United States, outside of the thirteen original states and the insular possessions, has been, at one time or another, public land (a total of 2,925,000 square miles), and the amount remaining unreserved and unappropriated in 1927 was approximately five hundred million acres, an area larger than any state except Texas.⁴ Vast quantities were in earlier times granted to states in aid of education and internal improvements and to transcontinental railroads; much was allotted to soldiers and sailors; a great deal has been sold, either to corporations and individual speculators, or to settlers under the easy terms

¹ See p. 552.

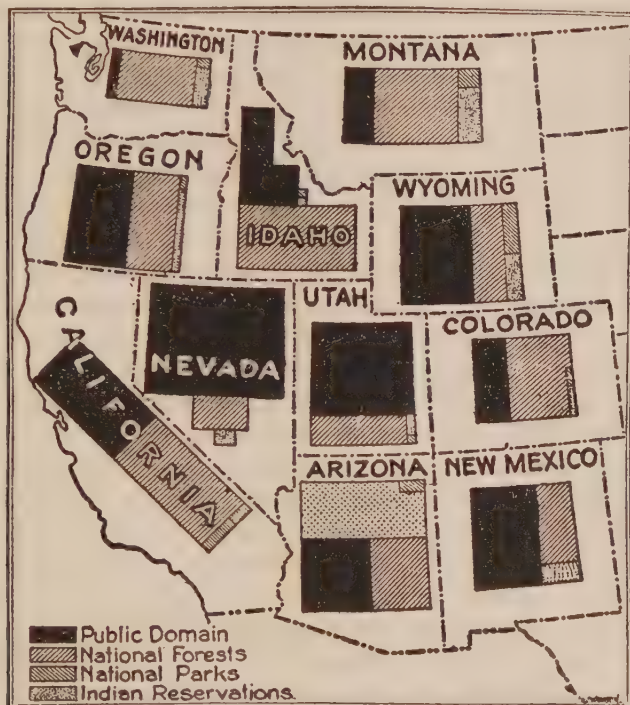
² See pp. 341-346 below.

³ For example, the forestry bureau is in the Department of Agriculture.

⁴ In the United States proper, about 194,000,000 acres, and the remainder in Alaska. There are public lands in Porto Rico, Hawaii, and the Philippines. But these are administered by the territorial governments.

of a homestead act of 1863. Prodigality prevailed in earlier days, and many species of fraud were practiced. Of late, however, this fast disappearing resource has been better husbanded. On the basis of careful surveys, the land is now classified as mineral,

CHAP.
XX



From the New York Times

GOVERNMENT HOLDINGS IN PUBLIC LAND STATES

More than half the land in these eleven states is held by the federal government. The 42,000,000 acres of government mineral lands (containing coal, oil, potash, and minerals) are not included in the map, as they are not confined to the eleven public land states.

timber, grazing, or agricultural; legislation fully regulates the acquisition of mineral land and land affording water-power sites; and every effort is made to favor the bona fide home-seeker as against the mere speculator. Under the direction of the general land office at Washington, about a hundred local land offices, each in charge of a register and a receiver, are prepared to consider claims, issue land patents, and transact other public-land business.

CHAP.
XXOther
services
having to
do with
resourcesMiscel-
laneous
bureaus

Sales and leases of all kinds proceed at the rate of about ten million acres a year.¹

The reclamation service, established in 1902, is charged with the construction and maintenance of irrigation works in arid and semi-arid regions, thus helping private and state enterprise to make available for farmers the hundreds of thousands of acres of dry lands in the western states. The reclaimed lands are sold to settlers on an instalment plan; and more than a million acres were put on the market up to 1918.² Greater difficulties than were originally anticipated have, however, been encountered—especially the heavier costs of irrigation projects and the longer time required to make reclaimed land reliably productive—and beginning in 1924 committees of expert advisers have submitted extensive recommendations for legislation aimed at enabling the government's reclamation work to achieve in a more adequate manner the human and economic purposes for which it was begun. The geological survey studies, reports, and publishes maps and charts on the topography, geology, and water and mineral resources of the country, and classifies the public lands.³

Finally, it may be noted, in a word, that the pension office examines pension claims, keeps pension records, and attends to the payment of pensions, in accordance with both general law and a vast number of special enactments, and also administers retiring allowances in the civil service.⁴ The Indian office acts as the official guardian of some 350,000 Indians (all of them recently made citizens of the United States) living on two hundred reservations with an aggregate area as large as New England and New York combined. It promotes their health and physical welfare, directs their education, encourages their native arts and crafts, and supervises their lands and funds.⁵ The bureau of education gathers statistics, makes surveys, prepares reports, issues digests of school laws, organizes conferences, and offers recommendations for the improvement of educational facilities and methods, but has practically

¹ Anon., "The General Land Office," *Service Monographs*, No. 13 (Baltimore, 1923); W. E. Smythe, "A New Homestead Policy for America," *Rev. of Revs.*, LXV, 291-296 (Mar., 1922).

² F. A. Ogg, *National Progress, 1907-1917*, pp. 107-112; Anon., "The U. S. Reclamation Service," *Service Monographs*, No. 2 (Baltimore, 1919).

³ Anon., "The U. S. Geological Survey," *Service Monographs*, No. 1 (New York, 1918).

⁴ G. A. Weber, "The Bureau of Pensions," *ibid.*, No. 24 (Baltimore, 1923).

⁵ It is generally felt that the Indian Service has not kept pace with progress elsewhere, and a full investigation is at present (1928) under way at the hands of a committee set up by the Institute for Government Research.

no administrative duties except in the management of the education of native children in Alaska and the handling of certain funds for the use of colleges of agriculture and the mechanic arts.¹

CHAP.
XX

Suggestions that the national government extend the sphere of its activities to include the encouragement of agriculture were heard as early as Washington's administrations, and sundry plans for agricultural boards and bureaus were before Congress intermittently from 1817 onwards. Somewhat curiously, the first definite action was taken amid the stress of civil war, when, in 1862, a bill was approved creating, not an agricultural bureau in the Interior Department, as some advocated, nor yet a coördinate executive department with a representative in the cabinet, as others urged, but a "department" in charge of a commissioner, with rank and salary distinctly below those of the heads of the existing departments.² Agricultural interests were not satisfied, and the rapid increase of activities of the so-called department in the next twenty-five years, accompanied by growing appropriations, enabled them finally to carry their point that agriculture ought to have a spokesman in the cabinet; and in 1889 President Cleveland signed a bill which raised the Department of Agriculture to the grade of an executive department, in charge of a secretary of cabinet rank. One assistant secretary was provided for—a number which, contrary to experience in most other departments, has not been increased.³

8. The Department of Agriculture

Already in 1889, the work of the department was of a widely varied and undoubtedly useful character. But during the three and one-half decades since that date, new functions have been added and tasks assumed, until nowadays the department represents by all odds the greatest governmental establishment of its kind—in scope of activities and in number of employees—in the world. As one of the ten executive departments, it presents two or three distinguishing characteristics. It has practically no functions that are not clearly germane to the principal object of its existence. It has grown almost entirely from within, developing its plans and needs, and subsequently securing from Congress the appropriations

Special character-istics

¹ D. H. Smith, "The Bureau of Education," *Service Monographs*, No. 14 (Baltimore, 1923); H. B. Learned, "The Educational Function of the National Government," *Amer. Polit. Sci. Rev.*, XV, 335-349 (Aug., 1921). See pp. 344-345 below.

² This measure was accompanied by the Morrill Act granting tracts of land for the establishment of agricultural colleges in the states, and also by an important homestead act. See p. 560.

³ H. B. Learned, *The President's Cabinet*, Chap. XI.

necessary to their fulfillment; Congress has not thrust miscellaneous and alien bureaus and activities upon it, as in the case of several other departments. The head of the department has complete control, and the organization is more compact, than in most of the older departments. Finally, because of the technical, scientific nature of much of the work, the merit system prevails more generally than elsewhere and the handicaps of political appointments are least in evidence. It is significant that Mr. James Wilson served continuously as head of the department from 1897 to 1913, although, of course, it is true that there was no party change in the White House during this period.

Even the briefest description of the work of the department would demand more space than is available here; there are no fewer than eighteen main bureaus or services, each with a large domain of activity and a staff suited thereto. Under a plan of reorganization which went into effect on July 1, 1923, most of these services are coördinated in three divisions, each under a directing head. The original and still most important work of the department is scientific research and dissemination of the information gained thereby, and under the general supervision of a director of scientific work are gathered six bureaus—animal industry,¹ plant industry, biological survey, chemistry, soils, and entomology—which are given over entirely to investigation, experiment, and study, with a view to improvements in the growing of crops, the breeding of live stock, and related industries. A director of extension service has charge of all branches active in sending out to the public facts brought to light, and other useful information. This work is done largely through extension agents in coöperation with agricultural colleges.² And a director of regulatory work has charge of administration of the numerous laws falling within the department's range of responsibility.³

Several bureaus, however, remain outside this three-fold classification. One is the bureau of home economics, originating in the reorganization of 1923, and in charge of a scientifically trained and experienced woman. Another is the bureau of public roads,⁴ which investigates road materials, road construction, and road

¹ F. W. Powell, "The Bureau of Animal Industry," *Service Monographs*, No. 41 (Baltimore, 1927).

² See p. 561.

³ For example, the Packers and Stockyards Act, the Grain Futures Act, and the Insecticide and Fungicide Act.

⁴ W. S. Holt, "The Bureau of Public Roads," *Service Monographs*, No. 26 (Baltimore, 1923).

maintenance, and also irrigation and drainage questions. A third is the forest service, which takes care of the hundred and fifty national forests, investigates forestry problems, and shares responsibility with the land office and the reclamation service in the Department of the Interior for carrying out and extending the conservation program gradually developed since 1900. A fourth is the well-known weather bureau, which, with the aid of its numerous stations throughout the country, conducts meteorological inquiries and forecasts weather conditions for the benefit alike of agriculture, commerce, and navigation—a bureau, it may be added, whose usefulness is vastly increased by the development of communication by radio.¹ A fifth is the bureau of agricultural economics, created in 1922, in which are merged several agencies, once separate, having to do with the study of economic questions involved in production, marketing, and distribution of farm products. Finally, there is the division of coöperative marketing, created by an act of 1926 and charged with the amassing of full information on coöperative principles and practices. The most notable development of the departments' work in recent years has been, indeed, in the promotion of agriculture on its economic, as distinguished from its scientific, side. On June 30, 1927, the department had more than twenty-one thousand full-time employees, of whom more than four-fifths were engaged in work outside of Washington.²

The movement for a department of agriculture prompted similar agitation by commercial interests and organized labor. A purely statistical bureau of labor, organized in the Interior Department in 1884, became, four years afterwards, a so-called department of labor. But only in 1903 was a full-fledged department set up, with a representative in the cabinet, and then only in conjunction with commerce. The main interest was, indeed, in a department of commerce, which President Roosevelt urged upon Congress as a national necessity in view of the difficult problems arising from the growth of big business in the opening years of the century. The bill creating a department of commerce and labor was opposed by labor organizations, which demanded a

Demand
for com-
merce and
labor de-
partments

¹G. A. Weber, "The Weather Bureau," *Service Monographs*, No. 9 (New York, 1922).

²L. M. Short, *Development of National Administrative Organization in the United States*, Chap. xvii; D. F. Houston, "How the Government Works with the Farmer," *Rev. of Revs.*, LX, 502-507 (Nov., 1919); H. C. Wallace, "A Helping Hand to American Farmers," *Curr. Hist.*, XVIII, 104-109 (Apr., 1923).

separate and coördinate labor department. It, however, became law (1903);¹ and only in 1913, in the closing days of the Taft administration, was the separation which labor wanted finally brought about. Since the last-mentioned date there have been distinct commerce and labor departments.²

The combined department as organized in 1903 represented, in the main, a consolidation of offices and services transferred from the State, Treasury, and Interior departments, together with the hitherto independent "department" of labor; only two new bureaus appeared, *i.e.*, manufactures and corporations, and both of these have now dropped out.³ As at present constituted, the Department of Commerce contains eleven bureaus and services, presided over by chiefs or directors, under the general supervision of the secretary and one assistant secretary.⁴ The bureau of foreign and domestic commerce collects and publishes commercial statistics, investigates and reports on trade openings, and coöperates generally with American manufacturers, exporters, financiers, and domestic merchants. It is organized in upwards of thirty divisions, some in charge of development in definite parts of the world (Latin America, Far East, etc.) and some having to do with encouragement of traffic in particular commodities (textiles, paper, food-stuffs, agricultural implements, etc.), besides technical divisions of foreign tariffs, statistics, research, etc., and administrative divisions of editorial work, correspondence, and similar activities. The director reported in 1927 that the bureau's work had increased nearly twenty-three per cent over that of the previous year, and that in a single twelvemonth it had responded, in almost two and one-half million cases, to "the expressed desire of American business men for pertinent information or direct assistance in the acquiring of new business or the furthering of already established trade."⁵ This bureau is a great and growing factor in our national economic life. As has been pointed out, it may eventually absorb

¹ H. B. Learned, *The President's Cabinet*, Chap. XII; F. Emory, "The New Department of Commerce and Labor," *World's Work*, V, 3334-3337 (Apr., 1903).

² The history of these departments is related in L. M. Short, *Development of National Administrative Organization in the United States*, Chap. XIX.

³ The first was merged with the bureau of statistics to form the bureau of foreign and domestic commerce in 1912; the second was abolished in 1915 as a result of the establishment of the Federal Trade Commission (see p. 543).

⁴ An air commerce act of 1926 provided for an assistant secretary for aëronautics.

⁵ *Fifteenth Annual Report of the Secretary of Commerce* (1927), 70.

all of the trade-promotion functions hitherto devolving upon our consuls.¹

CHAP.
XX

There are at least five other bureaus whose work relates mainly or wholly to commerce—not, it is true, to trade itself, but to the physical facilities with which it is carried on. The bureau of navigation has to do with the inspection of naval architecture, admeasurement and numbering of vessels, administration of tonnage taxes, and enforcement of navigation laws; and it licenses all radio operators and stations on shipboard, at shore stations, and throughout the country.² The steamboat inspection service inspects certain classes of domestic merchant steam vessels, motor vessels, sailing vessels, and barges of the United States, and foreign steam vessels carrying passengers from ports of the United States, except those of countries having reciprocal inspection with the United States.³ The lighthouse service has charge of the construction and maintenance of lighthouses and other aids to navigation along the coasts, the Great Lakes, and the principal rivers of the country. The coast and geodetic survey assists mariners by charting the coastlines of the United States and its dependencies, as well as lake and river beds and ocean currents.⁴ And an assistant secretary for aeronautics and a director of aeronautics coördinate the activities of sundry agencies of the department which have to do with executing an air commerce act of 1926 relating especially to such matters as the provision of civil airways and air ports, the inspection and licensing of air craft, the investigation of accidents, and the enforcement of air-traffic rules.

Subsidiary
bureaus

There are, in addition, certain bureaus whose connection with commerce is more incidental. A fisheries bureau promotes commercial fisheries and fishery industries, aids in the propagation and conservation of fishery resources, and supervises the Alaska fur-seal industry. A bureau of standards carries on research in fields in which precise measurements are required, and compares and tests standards of measurement employed in scientific investigation, commerce, and educational institutions with the standards adopted or recognized by the government. A bureau of

Miscel-
laneous
bureaus

¹ See p. 311. L. F. Schmeckebier and G. A. Weber, "The Bureau of Foreign and Domestic Commerce," *Service Monographs*, No. 29 (Baltimore, 1924).

² L. M. Short, "The Bureau of Navigation," *Service Monographs*, No. 15 (Baltimore, 1923).

³ L. M. Short, "The Steamboat Inspection Service," *Service Monographs*, No. 8 (Baltimore, 1922).

⁴ G. A. Weber, "The Coast and Geodetic Survey," *ibid.*, No. 16 (Baltimore, 1923).

mines (transferred from the Department of the Interior in 1925) investigates methods of mining, mine accidents and the means of preventing them, and the treatment and utilization of ores, and seeks to bring about both safer and more healthful conditions among workers in the mineral industries and increased efficiency in the use of the country's mineral resources. A radio division, set up in pursuance of a radio act of 1927, works in conjunction with a federal radio commission created by that statute, the commission itself for the present, however, exercising the important powers of licensing radio stations and fixing wave-lengths, power, and hours of operation, with a view to eliminating the confusion in these matters which the unexpectedly rapid development of radio broadcasting in recent years naturally produced.

Finally, there are the patent office and the bureau of the census. Authorized by the constitution to make laws "to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,"¹ Congress passed the first patent act in 1790. Machinery for administering the law was gradually built up in the State Department, but was transferred in 1849 to the Department of the Interior, and again, in 1925, to the Department of Commerce. Patents are issued upon application of inventors if, after careful scrutiny, the device or process is judged by expert examiners to be novel and useful; and the right to exclude others from manufacturing, using, or controlling the device or process runs for seventeen years. Upwards of half of all patents issued in the civilized world have been granted in the patent office of the United States; the millionth was issued in 1911, and the one and one-half millionth on July 1, 1924. Each applicant pays a fee of forty dollars, and the patent office has become one of the relatively few government establishments that not only pay their way, but yield a surplus. It is hardly necessary to add that records and models at Washington afford an unsurpassed panorama of the progress of the industrial and scientific arts in the past hundred years.²

¹ Art. I, § 8, cl. 8.

² On the legislative and judicial aspects of copyrights and patents, see pp. 551-553. Trade-marks and labels are also registered in the patent office, at a present rate of some seventeen thousand a year. Registration entitles the owner to exclusive use of the trade-mark or label for a period of twenty years, and at the end of that time is renewable for a like period. *U. S. Compiled Statutes* (1918), pp. 1532-1537; *ibid.* (1923), pp. 628-630; G. A. Weber, "The Patent Office," *Service Monographs*, No. 31 (Baltimore, 1924).

The bureau of the census—"the greatest fact-finding and figure-counting agency in the world"—is charged with taking the decennial census required by the constitution, and also the various supplementary enumerations provided for by statute. Until two decades ago, decennial censuses were taken by a staff specially organized on each occasion for the purpose, and when the work was completed the machinery was dismantled, to be set up entirely anew at the next census period. A permanent census office, under a director, was, however, established in 1902,¹ partly with a view to developing an experienced staff, but mainly in order to enable the work to be done more deliberately by being carried on, in one phase or another, practically all of the time. The range of census inquiries has increased greatly, and the published reports have grown proportionately voluminous. Whether consulted in their fuller form or in the form of the convenient *Abstract* published decennially, these reports give a comprehensive and illuminating view of the population, occupations, wealth, and activities of the country.² Since 1921, the census of manufactures has been biennial, and, in fact, in certain industries, annual; by law of 1919, the census of agriculture is quinquennial. For a brief period, while the decennial census is being taken, one person out of every thousand in the country is engaged in census work.

CHAP.
XX
—
The
census

As defined by the organic act of 1913, the purpose of the Department of Labor is "to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment." The different branches of the department, therefore, have to do in an exceptionally direct way with matters affecting the everyday well-being of men, women, and children. At the outset there were only four of these branches, *i.e.*, the bureaus of labor statistics, immigration, and naturalization, and the children's bureau. But as a result of successive reorganizations and of functional expansion there have come to be double that number (although not of coördinate rank), under the general supervision

10. Depart-
ment of
Labor

Labor
services
proper

¹ In the Interior Department, but transferred to the Department of Commerce and Labor in 1903, and retained in the Department of Commerce since 1913.

² W. R. Merriam, "The Evolution of American Census-taking," *Century Mag.*, XLIII, 831-842 (April, 1903); J. Cummings, "The Permanent Census Bureau; a Decade of Work," *Amer. Statist. Assoc. Pub.*, XIII, 606-638 (Dec., 1913); W. F. Willeox, "Development of the American Census Office since 1890," *Polit. Sci. Quar.*, XXIX, 438-450 (Sept., 1914).

of a secretary and two assistant secretaries. Historically, the department's primary function is the gathering and publishing of labor statistics; and the bureau devoted to this work (really dating from 1885) has amassed great quantities of useful information pertaining to the labor supply, labor productivity, hours, wages, prices and cost of living, strikes and lockouts, labor laws and court decisions, women in industry, industrial accidents, workmen's compensation, and other labor interests, both in this country and abroad. The results of the investigations are made available promptly through a monthly publication, the *Labor Review*, supplemented by numerous monographs or "bulletins." With a view to promoting industrial peace, a division of conciliation was organized in the department in 1913. When trade disputes arise, commissioners of conciliation representing the department offer their services as mediators; in the single year ending June 30, 1927, commissioners were assigned in 545 instances of strikes, threatened strikes, and lockouts, involving almost six hundred thousand workers, and in 395 of the cases the efforts at pacification were successful.¹ Still another branch of the department is the United States employment service, organized on its present basis in 1918, and representing one of the very few Labor Department "war services" that now survive. In coöperation with the public employment services of various states and municipalities, the national service placed in employment more than a million and a half men and women during the fiscal year 1927. Naturally, the number of persons aided in securing positions in any given period varies with the general condition of the labor market.²

Two important bureaus of somewhat different nature are those dealing specially with the interests of children and women. The children's bureau, created in 1912 to investigate and report upon "all matters pertaining to the welfare of children and child life among all classes of our people," has thus far given attention mainly to problems of child hygiene, child dependency, child employment in industry, and juvenile delinquency. The women's bureau, dating from 1920, is required to "formulate standards and policies which shall promote the welfare of wage-earning women, improve their working conditions, increase their efficiency, and advance their opportunities for profitable employment." In pur-

¹ J. Bernhardt, "The Division of Conciliation," *Service Monographs*, No. 20 (Baltimore, 1923).

² D. H. Smith, "The United States Employment Service," *ibid.*, No. 28 (Baltimore, 1923).

suance of these objects, it investigates conditions of women in industry, confers and coöperates with state departments of labor, holds public conferences, and engages in research on a wide variety of topics connected with the well-being of the eight and one-half million women employed in gainful occupations.¹ Every year the bureau is obliged to refuse more requests than it can grant for help in investigations and for consultation on local problems asked for by employers and employees, public and private organizations, and other persons and agencies interested in women's employment.²

Finally, there are the two somewhat older bureaus of immigration and naturalization. It will be necessary to touch upon their work at a later point³; hence little need be said about them here. Under the national quota system adopted in 1924, the number of aliens entering the country is considerably smaller than in earlier years. The task of administering the laws on the subject is, however, far from proportionately lessened.⁴ Furthermore, the naturalization of aliens being carried on by the courts, rather than by a special field force of the Labor Department, the bureau of naturalization is small numerically, but again is not without intricate problems and tasks, especially in seeing that the naturalization laws are not evaded and in encouraging assimilation and citizen training. Both of these services, it may be noted, are financially self-sustaining.⁵

One need not be surprised to be told that in the vast mechanism of executive and administrative agencies, outlined in this chapter and the preceding one, there is a good deal of illogical grouping, duplication, and confusion, with resulting waste of effort and of money. Some parts of the system have been designed to meet definite administrative needs and have been carefully correlated with other preëxisting arrangements. But in many cases public demand—or at all events, the demand of an influential group or interest—has led to the establishment of a new bureau or service, or even of an entire department (*e.g.*, Agriculture and Labor), without much reference to its relations with other parts of the governmental machinery; too often a new bureau or division has been

CHAP.
XX

Movement
for admin-
istrative
reorganiza-
tion

¹ This is the 1920 figure. Unfortunately, there is none later.

² *Annual Report of the Secretary of Labor* (1927), 204. Cf. G. A. Weber, "The Women's Bureau," *Service Monographs*, No. 22 (Baltimore, 1923).

³ See pp. 528-532.

⁴ D. H. Smith and H. G. Herring, "The Bureau of Immigration," *Service Monographs*, No. 30 (Baltimore, 1924).

⁵ D. H. Smith, "The Bureau of Naturalization," *ibid.*, No. 46 (Baltimore, 1926).

simply tacked on at any point that at the moment seemed convenient. As a result, four main defects appear: (1) several departments, *e.g.*, Treasury and Interior, contain bureaus that have no relation to the department's proper field; (2) several services that ought to be integrally organized and conducted, *e.g.*, public health activities, are divided among different departments; (3) numerous detached agencies, although nominally under the direction of the president, are not sufficiently linked up with any coördinating officer or influence;¹ and (4) machinery is lacking for the management of the administrative branch of the government considered as a whole.²

President Taft was strongly of the opinion that improvements could be made, and accordingly he secured from Congress in 1910 an appropriation for an investigation. An able commission on economy and efficiency was created, and by far the most comprehensive and systematic study of the executive and administrative parts of the government ever undertaken was carried out, under five main heads: problems of a national budget, problems of organization, problems of personnel, problems of financial procedure, and problems of business practice and procedure. A report fully describing the existing organization of the executive branch was published in 1911,³ and many concrete recommendations for the abolition of certain services and the consolidation of others were offered. Unfortunately, no action was taken. The commission went out of existence in 1913 because of the failure of Congress to make provision for its support; a change of the party in power turned government activities into different channels; and the subsequent entrance of the country into the World War thrust the matter completely into the background.⁴

After peace was restored, however, the project was revived.

¹ No description, or even enumeration, of the detached agencies is attempted here, for the reason that the more important ones are dealt with at other appropriate points. On the Civil Service Commission, see p. 289; the Bureau of Efficiency, p. 294; the Bureau of the Budget (nominally in the Treasury Department, but practically independent), p. 503; the Tariff Commission, p. 491; the Farm Loan Board, p. 517; the Interstate Commerce Commission, p. 537; the Federal Trade Commission, p. 544. For a complete survey, see L. M. Short, *Development of National Administrative Organization in the United States*, Chap. xx.

² Short, *op. cit.*, 470.

³ "Outline of Organization of the United States Government, July 1, 1911," transmitted to Congress by the president, January 17, 1912 (62nd Cong., 2nd Sess., House Doc. No. 458).

⁴ G. A. Weber, *Organized Efforts for the Improvement of Methods of Administration in the United States* (New York, 1919), 84-94.

The enormous multiplication of governmental agencies in the war period compelled considerable readjustments and retrenchments and gave fresh emphasis to the need of a general reorganization. Certain of the states, notably Illinois, were actively carrying out highly advantageous administrative reforms.¹ And bills began to appear in Congress providing for the conversion of the Department of the Interior into a department of public works and for the creation of departments of education, public welfare, conservation, public health, and even highways, aeronautics, and fine arts. Near the close of President Wilson's administration, an act was approved (December 29, 1920) creating a congressional joint committee (of six members) on reorganization,² and in the following spring President Harding was authorized to appoint a seventh member representing the executive.³ Mr. Walter F. Brown, of Toledo, the president's appointee, became, indeed, chairman of the committee.

CHAP.
XXCongressional
joint committee on
reorganization (1920)

Since 1921, consideration of the subject has gone forward intermittently, under handicaps imposed not only by the bewilderingly complicated nature of the problem, but by partisan and personal influences, including the opposition of various bureau chiefs and other officers who would be affected personally, or whose branches of the service would be affected, by the proposed changes. Various plans of reorganization were prepared for the committee's consideration, notably one emanating from the Institute for Government Research at Washington (a private research establishment)⁴ and another, on less ambitious lines, from the National Budget Committee, of New York City.⁵ The joint committee presented a preliminary report to the president in January, 1922, recommending, among other things, the establishment of a department of public welfare—already, in fact, proposed in a bill introduced by Senator Kenyon in 1921. Discussion of the suggestions went on in executive circles until February, 1923, when the committee presented a prospectus of its plans in the form of a letter from President Harding to Chairman Brown, accompanied by a chart exhibiting in detail the existing organization, and showing

Develop-
ments
since 1921

¹ See Chaps. XXXVIII-XXXIX. W. F. Dodd, "State Reorganization and the Federal Problem," *Acad. Polit. Sci. Proceedings*, IX, 142-151 (1921).

² 41 *U. S. Stat. at Large*, 1083.

³ 42 *U. S. Stat. at Large*, 3.

⁴ Set forth in full in W. F. Willoughby, *Reorganization of the Administrative Branch of the National Government* (Baltimore, 1923). Dr. Willoughby is director of the Institute.

⁵ Published by the committee under the title, *A Proposal for Government Reorganization* (2nd ed., New York, 1921).

in parallel columns the changes which the president and his associates were prepared to endorse.¹ Conspicuous among these were: consolidation of the military and naval establishments in a single department of national defense; transfer of all non-military functions of the present War and Navy departments to civilian departments; withdrawal of all non-fiscal functions from the Treasury Department; attachment of many of the present independent establishments to some one of the departments; and creation of one new department, *i.e.*, education and welfare.

Depart-
mental
Reorganiza-
tion Bill,
1924-25

Congress made provision for continuing the joint committee, but otherwise nothing further happened until June 3, 1924, when Senator Smoot, representing the committee, introduced a "departmental reorganization" bill based upon a final report filed on the previous day. By no means all of the proposals of president and committee appeared in this measure. For example, the union of War and Navy departments, vigorously opposed by both departments, was dropped. But the bill undertook (1) to transfer the patent office and the bureau of mines to the Department of Commerce, (2) to move the bureau of public roads and the office of supervising architect to the Interior Department, (3) to release the bureau of the budget from its nominal connection with the Treasury Department, (4) to set up an independent bureau of purchase and supply, (5) to make fresh assignments in certain departments to the assistant secretaries, (6) to authorize cabinet officers to reorganize their departments, subject to the approval of the president, and, finally, (7) to create an eleventh department, to be known as the department of education and relief, presided over by a cabinet officer, and charged with three major activities—education, public health, and veteran relief—each under the immediate control of an assistant secretary. The new department was to absorb (among other things) the existing veterans' bureau, the public health service of the Treasury Department, and the bureaus of pensions and education, now in the Department of the Interior.

Failure
to adopt
a plan

Notwithstanding endorsement of the proposals (including the new department) in the Republican platform of 1924, and the earnest support of the plan by President Coolidge, the bill did not even reach the floor for debate in either house before the Sixty-eighth Congress expired on March 4, 1925. At the next regular session a measure was introduced which would have set up a new joint commission of five persons charged with "surveying the

¹ 67th Cong., 4th Session, Sen. Doc. No. 302.

administrative branches of the government'' and recommending to the president transfers of bureaus or other units from one department or independent establishment to another, and empowering the president to carry out such changes by executive order, though not to go so far as to abolish or create a department. Hearings were held on this bill; but again nothing happened. The truth was that while almost everybody was prepared to render lip-service to the general principle of reorganization, whenever a concrete plan was presented sufficient elements were found in opposition to ensure its defeat. This opposition, it should be observed, was by no means entirely selfish or stupid. No plan was so good but that others could be brought forward that, from certain points of view, had at least equal claims. There was honest doubt whether certain of the suggested changes—especially the creation of a new executive department—would not lead to undesirable increases of national control at the expense of the states. There was fear, too, lest reorganization might be found to have had the effect of throwing certain services or agencies into politics. For example, the Department of Agriculture has generally been relatively free from the blight of political appointments, removals, and influence, while in such departments as the Interior politics has been more in evidence; so that when, a few years ago, the proposal was made to consolidate the government's engineering activities in a bureau of engineering in the Interior Department, the bureau of roads (in the Department of Agriculture) strongly opposed the suggestion—¹ as, indeed (and for the same reason that), other units in the Agricultural Department have also at different times resisted transfer.

The outcome remains to be disclosed. New bills on the subject continue to appear; but no action results. The matter is, however, far too important to be dropped, and it is safe to assume that the discussion will go on until more or less extensive changes have been made. When made, they may not prove to be all that might be desired; but this will not be for lack of expert and disinterested study of the problems involved. The number and variety of government functions and services is much too great to permit of any grouping that will be wholly logical, symmetrical, and free from duplication; and it does not follow that such an arrangement, if it were possible, would be cheapest and best. No one doubts, however,

CHAP.
XX

The outcome problematical

¹ The American Engineering Council, in 1927, put forward an alternative plan for the abolition of the Department of the Interior and the creation, in its place, of a department of public works and domain.

that far-reaching improvements in the present machinery are entirely practicable, or that now is an exceptionally favorable time to make them.¹

REFERENCES

- L. M. Short, *Development of National Administrative Organization in the United States* (Baltimore, 1923), Chaps. xvii-xix, xxiii.
 J. A. Fairlie, *National Administration of the United States* (New York, 1909), Chaps. xiii-xvi.
 F. J. Haskin, *The American Government* (new ed., Philadelphia, 1923), Chaps. xii-xxi.
 H. B. Learned, *The President's Cabinet* (New Haven, 1912), Chaps. x-xii.
 L. F. Schmeckebier, *The Statistical Work of the National Government* (Baltimore, 1925).
 B. H. Hibbard, *History of the Public Land Policies* (New York, 1924).
 S. G. McLendon, *History of the Public Domain of America* (Atlanta, 1924).
 W. L. Wanlass, "The United States Department of Agriculture: a Study in Administration," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, xxxviii, 1-131 (1920).
 C. R. Van Hise, *The Conservation of Natural Resources in the United States* (New York, 1915).
 G. W. James, *Reclaiming the Arid West* (New York, 1917).
 C. D. Wright and W. C. Hunt, *History and Growth of the United States Census* (Washington, 1900).
 J. A. Tobey, *The National Government and Public Health* (Baltimore, 1926).
 R. D. Leigh, *Federal Health Administration in the United States* (New York, 1927).
 G. A. Weber, *Organized Efforts for the Improvement of Methods of Administration in the United States* (New York, 1919).
 W. F. Willoughby, *Reorganization of the Administrative Branch of the National Government* (Baltimore, 1923).
 J. E. Johnsen, *A Federal Department of Education* (New York, 1927).
 G. C. Thorpe, *Federal Departmental Organization and Practice* (Kansas City, 1925). A useful reference work.
Service Monographs of the United States Government (as cited in footnotes).
The United States Daily (Washington).
 Annual reports of the heads of departments (see p. 327).

¹One may hazard the guess that if an eleventh executive department is created it will be a department of human welfare, or of health and education. See R. D. Leigh, *Federal Health Administration in the United States*, 583-586. The general subject is well treated in L. M. Short, *Development of National Administrative Organization in the United States*, Chap. xxiii. Cf. J. T. Pratt, "A Proposal for Government Reorganization," *Acad. Polit. Sci. Proceedings*, ix, 17-30 (1921). Several other papers on different phases of the subject appear in this volume.

CHAPTER XXI

THE STRUCTURE OF CONGRESS

“Congress,” writes a former distinguished member of that body, “is the law-making department of the government, and this function, in a government which is theoretically one of law, entitles it to preëminence under our system. It is the established organ by which the people are supposed to declare the policies that are to govern them.”¹ The Senate and House of Representatives, it is true, enjoy no such wide sweep of authority as the British Parliament. Their powers, taken as a group, are, indeed, less extensive than those of the parliaments of Germany, France, Canada, and many other countries. Congress is strictly bound by the constitution, which it has no power to amend; it cannot appoint or fully control the executive; it is hedged about by the reserved authority of forty-eight state legislatures, whose functions and rights are quite as solemnly guaranteed as are its own. Nevertheless, whatever legislative power the nation possesses is vested definitely and permanently in Congress, and, as has already appeared and will be more fully explained below, to its strictly legislative powers are added, largely as a result of the application of the principle of checks and balances, four or five other powers of first-rate practical importance.² We now turn to a study of this interesting and imposing part of our governmental system—its structure, organization, procedure, functions, powers, limitations, features of strength and elements of weakness.

The easiest decision that the framers of the constitution had to make was that in favor of establishing a national congress. For thirteen years the common affairs of the colonies, and later states, had been managed by such an agency; the constitutional convention was itself held by congressional authority; the first necessity of any republican scheme of government was recognized to be a representative body; and every plan suggested for the convention’s consideration made Congress a central, vital feature. The only doubt,

Importance
of the two
houses

Why the
bicameral
system was
adopted

¹ S. W. McCall, *The Business of Congress*, 3.

² See p. 456.

aside from questions of power, was as to whether there should be one house or two, and what, in either case, should be the basis of membership. The decision in favor of the bicameral form was influenced by several considerations. In the first place, practically all precedent, except that of the existing Congress, pointed in that direction. The English Parliament consisted of the House of Commons and the House of Lords. Most of the colonies had had two legislative chambers. All of the new state constitutions except those of Vermont, Pennsylvania, and Georgia, provided for a relatively large, popularly chosen lower house and a smaller, more conservative upper house. And, on the whole, the plan had worked well. A second consideration, of a more theoretical nature, was that it was unwise to entrust the large legislative powers that were now to be given the national government to a single chamber—most of all, to one whose members were to be elected by direct popular vote. A more conservative upper house seemed to be needed as a check upon hasty, prejudiced, or otherwise ill-considered, legislative actions. Finally, strong practical reasons appeared for creating two houses. The conflict that arose in the convention between the small and large states has been described.¹ It might easily have put an end to the deliberations and frustrated all hope of a stronger union. The step that chiefly averted this disaster was, as we have seen, the adoption of the so-called Connecticut compromise, under which the states were to be represented according to numbers in a lower house, but on a footing of equality in an upper house. Only in the organization of the Senate was a practical way found of not merely saying that the states were equal, but giving them an actual equality of power and importance.

The
bicameral
system
useful
in the
national
government

Events have justified the decision. We shall see that in the domain of local government the bicameral principle has little to commend it, for the reason that, in the main, legislative action does not there extend to matters affecting life, liberty, or other fundamental interests and rights. The plan is not followed in English local government, and it has been largely abandoned in municipal government in our own country, where formerly it was almost universal. Of late, it has been brought into question, too, as applied to our state legislatures. But as applied to Congress, it is generally and properly regarded as highly desirable, if not essential. It entails added expense and sometimes leads to unfortunate delay and shifting of responsibility. But it lends stability, checks

¹See p. 110.

legislation on mere impulse, ensures the consideration of measures from more varied angles than would otherwise be the case, and, as now operated, imposes no serious restraints on the influence of public opinion. The kind of representation for which the Senate provides is different from, but hardly less desirable than, the kind provided for in the House.

CHAP.
XXI

How this comes about will appear if we look into the composition of the two branches. In contrast with both the president and the Senate, the House of Representatives was intended to be an organ of government directly representing the general body of the people; and accordingly the constitution provides that the members shall be elected "by the people of the several states." Under a unitary form of government, such as prevails in England and France, members of the popular branch of the legislature are chosen in accordance with uniform suffrage regulations, which are laid down by national laws. In some federally-organized states, also, this is the case; in the former German empire, members of the Reichstag were elected under a single Imperial suffrage law, notwithstanding wide differences in the suffrage systems of the states, and the same is true in the present German republic. A different plan, however, prevails in the United States. No uniform national suffrage system has ever been set up here, either by the constitution or by law. The constitution stipulates only that for purposes of congressional elections "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature;"¹ so that, whoever is entitled under the constitution and laws of any given state to vote for a member of the lower branch of the legislature of that state, is *ipso facto* qualified to vote in that state for a member of Congress. Under the Fifteenth Amendment, a state may not withhold the right to vote on account of race, color, or previous condition of servitude, and under the Nineteenth, on the ground of sex. But these restrictions are general, and do not apply to congressional elections more than to others. In a subsequent chapter we shall see that suffrage regulations vary greatly from state to state.² Hence it follows that in some states only citizens can vote for members of Congress, while in others persons who have merely declared their intention to be naturalized can do so; that educational tests are

The House
of Repre-
sentatives

By whom
elected

¹ Art I, § 2, cl. 1. The Seventeenth Amendment extends this provision to the election of senators.

² Chap. xxxi.

imposed here and taxpaying qualifications there; that periods of residence differ, and also requirements for registration.

Although a broadly national, popular body, the House is further constructed with reference to state lines. Every representative is elected within a given state, and every state has, as such, a definite quota of members. Provisional quotas were assigned in the constitution, as originally adopted, to serve until a census could be taken; and thereafter representatives were to be apportioned among the several states "according to their respective numbers," which were to be computed by "adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."¹ The "other persons" referred to were, of course, slaves; and this clause, as has been pointed out, formed one of the important compromises of the constitution.² With the abolition of slavery, the three-fifths provision became obsolete, and the constitution now provides simply, in the Fourteenth Amendment, for apportionment among the states "according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed." It also provides for a reduction in the representation of any state which withholds voting privileges from adult male citizens of the United States "except for participation in rebellion, or other crime." Many states are, and have long been, liable to this penalty, though enforcement of it has never been found practicable.³

After the results of a decennial census are known, Congress sooner or later decides how many members the House of Representatives shall have until the next reapportionment is made, and allots to each state its share of the total. The apportionment must be made according to population, as just explained, with the qualification that each state is to have at least one representative, regardless of how scant its numbers may be. It is curious to note today that one of the grounds on which the constitution was opposed during the debates on ratification was that the House of Representatives would be too small; one of the papers in *The Federalist* is devoted entirely to an answer to that objection.⁴ As a matter of fact, the House long ago reached the point of unwieldiness. Starting with 65 in 1789, the membership rose at once, after the census of 1790, to 103. Following other censuses, it mounted as

¹ Art. I, § 2, cl. 3.³ See p. 610.² See p. 110.⁴ No. LVII (Lodge's ed., 350-355).

follows: 1820, 213; 1870, 292; 1880, 325; 1890, 356; 1900, 386; 1910, 435. Every reapportionment in our history except one¹ has brought a substantial increase. The reasons are not difficult to discover. One is the expansion of the country itself, resulting in the admission of new states, each entitled to a quota of representatives. But more important is the natural reluctance of states to see their quotas of representatives reduced to make room for increased representation of faster growing states. The only way of preventing such reductions from taking place on a considerable scale is to keep the ratio of population to membership relatively low—which, of course, means a substantial increase of members, at every reapportionment, from rapidly growing states. Still another obstacle to a diminution of members is the natural disinclination of members to legislate themselves out of districts. The membership of the House is still considerably smaller than that of either the British House of Commons or the French Chamber of Deputies.² But it is larger than is consistent with the most expeditious and effective work, and most members agree, as a matter of theory, at all events, that its further expansion must be prevented. Unwilling to increase the present membership, yet unable to devise any reapportionment that will not do so, Congress has failed, to the date of writing (1928), to make any reapportionment at all under the census of 1920.³

It must not be inferred that a state's quota is never reduced. Had the ratio been so maintained that no state should ever have lost representatives, the House would now be two or three times as large as it is. From a maximum of twenty-three, Virginia's quota dwindled to nine in 1872; and other cases of considerable shrinkage, especially in New England and the South, could be cited. Yet several reapportionments have been carried through without the loss of a seat by any state; and the act of 1911, based on the census of the previous year, was considered a marvel of ingenuity in that it did not diminish the representation of a single state, while yet increasing the total membership by only thirty-six.

¹ In 1842.

² House of Commons, 615; Chamber of Deputies, 612.

³ In 1921 the House passed a bill keeping its membership at 435, but the measure was not considered in the Senate. At the following session a House bill raising the number to 460 was pigeonholed. In March, 1928, it was announced that the House census committee had agreed upon a bill keeping the total membership of the House at 435, but taking one or more seats from sixteen states and bestowing one or more on twelve states; also that House leaders had promised to give the measure a preferred place on the calendar. Cf. R. T. Tucker, "Our Delinquent Congress," *New Republic*, XLVII, 11-13 (May 26, 1926).

The constitution requires that the number of representatives shall not exceed one for every 30,000 inhabitants. If that ratio were applied today, the House would have more than three thousand members! The ratio actually used in any given reapportionment is determined by dividing the whole population of the country by the number of members, for the ensuing decade, upon which Congress has decided. In 1792, it was 33,000; in 1852, about 93,000; in 1872, about 131,000; in 1891, about 174,000. With a population of approximately 92,000,000, and a total agreed membership of 435, the ratio in 1911 became a little less than 212,000, *i.e.*, almost seven times as large as in 1790. In the absence of any new apportionment under the census of 1920 (which revealed a population of 105,710,000), the ratio became at that date something over 243,000. Taking into account the later growth of population, the actual ratio today is still considerably larger. It need hardly be remarked that members sitting as the sole representatives of their states may have much smaller numbers of constituents.¹ The object of the ratio is, of course, to enable the proper allotment of representatives to the several states to be worked out. The ratio is divided into the population of each state in turn, and the quotient is the number sought. Sometimes, however, more or less contentious readjustments have to be made, notably when a major fraction, or even a large minor fraction, remains; and, occasionally, a state is voted an additional representative outright.

Beyond requiring a direct popular vote, the constitution does not say how representatives shall be chosen in the several states. On the contrary, it enjoins that the time, place, and manner of holding the elections be prescribed in each state by the legislature thereof, subject to the right of Congress to make or alter such regulations.² In the earlier days, Congress left the states to their own devices, and, naturally, wide differences of usage arose. Thus in some states the representatives were chosen from single-member districts; in others, on a general ticket, as are presidential electors

¹ Under the apportionment based on the census of 1910, there were four such states: Delaware (pop. 202,322); Nevada (pop. 81,875); Wyoming (pop. 145,965); and Arizona (pop. 204,354), which was admitted in 1912. It may be added that the average representative sits for from four to six times as many people as have been represented in recent years by the average member of the principal European lower chambers.

² Art. I, § 4, cl. 1. In the case of *Newberry v. United States*, the Supreme Court held that the constitutional authority of Congress to regulate elections does not include power to regulate nominations. 256 U. S., 232 (1921). Critical summaries of this decision will be found in *Polit. Sci. Quar.*, XXXVI, 472-476 (Sept., 1921), and *Amer. Polit. Sci. Rev.*, XVI, 22-24 (Feb., 1922).

today. As a result of a notable contest in the House in 1839 over the seating of five members elected on the general ticket plan in New Jersey, Congress provided in the reapportionment act of 1842 that, thereafter, every state entitled to more than one representative should be divided by the legislature into districts composed of contiguous territory and equal in number to the state's quota of representatives, and that each district should be entitled to elect one representative.¹ Subsequent congressional legislation authorizes a state receiving an increase in its quota to keep its districts intact and elect the additional representatives at large, if it desires to do so, or, indeed, in case of a decrease, to abandon its districts and elect the entire number at large; and, in accordance with at least the first of these special arrangements, states are sometimes found with one or two congressmen-at-large. But, in general, the district system prevails. Its chief advantage is, of course, that it affords an opportunity for minority representation; and this was the uppermost consideration in the minds of the authors of the law of 1842. Under a general ticket system, the Republicans would get the entire congressional delegation from a given state if they polled a bare plurality of the state-wide vote. Under the district plan, the Democrats would probably capture a few seats by polling a plurality in certain sections of the state in which they were strongest.

The district plan has, however, the disadvantage of opening a way for the misuse of power by the legislature for party advantage. After every census, each state whose apportionment of representatives has been altered is, sooner or later, redistricted; and, although national law requires the districts to be composed of "contiguous and compact territory containing as nearly as practicable an equal number of inhabitants," party majorities in the legislatures rarely resist the temptation, when laying out a new set of districts, to arrange boundary lines with a view to capturing the greatest number of congressmen at the ensuing elections. If the Republicans are in control, they will seek to mass the Democratic strength in a few districts, and to distribute their own strength in such a way as to yield small, but reasonably safe, pluralities in a large number of districts. It is both theoretically and practically possible thus to enable a minority of the voters, properly grouped, to return a majority of representatives for the whole state, and by the same token a state's party-quotas in Con-

Laying
out the
districts

¹ *U. S. Stat. at Large*, 491.

gress can be reversed by a carefully devised redistricting, practically, or even entirely, without change in the popular vote.

This practice is no new thing in our political experience. On the contrary, the name by which it is known, *i.e.*, "the gerrymander," was invented as early as 1811,¹ and the device itself goes back much farther. Nor is it confined to the laying out of congressional districts. Notwithstanding much legislation against it, it is equally common in the division of states into legislative districts, and of cities into wards. It results in congressional districts, in the same state, which have two and three times the population of other districts, and in districts of curious and indefensible shapes, *e.g.*, a former notorious "shoe string district" in Mississippi, extending almost the length of the state from north to south and constructed to minimize the effect of the negro vote, and the "saddlebag district" in Illinois, composed of two narrowly joined groups of counties on opposite sides of the state, and planned expressly to crowd as many Democratic counties as possible into a single district.² The custom is a bad one, but it is very difficult to break up. Practically, the districts cannot be made absolutely equal, and it is not feasible to make them as compact as mere physical considerations would dictate; it is at least thought to be desirable, for example, not to divide counties or cities between two or more districts.³ The rule being thus admittedly and properly flexible, however, evasions are hard to prevent. The one hopeful thing that can be said is that public sentiment condemns the gerrymander far more than it did during the heyday of to-the-victors-belong-the-spoils politics, and it is to this awakened feeling that we must look for a sort of "gentleman's agreement," such as will restrain party majorities from taking the advantage that can always be wrung, if they are minded to do it, from legislation touching the distribution of representation.⁴

Congress has gone farther in regulating congressional elections, than merely to require uniform use of the district system. Taking advantage of the clause of the constitution which authorizes it to

¹ The gerrymander takes its name from Governor Elbridge Gerry, of Massachusetts, who is reputed to have approved, if indeed he did not inspire, a notorious piece of partisan districting in his state.

² P. S. Reinsch, *American Legislatures and Legislative Methods*, 201-202.

³ This is, however, sometimes done; and, of course, large cities, as New York and Chicago, are themselves divided—usually along ward lines—into districts.

⁴ Maps showing how each of the states is divided into congressional districts will be found in *Congressional Directory*, 69th Cong., 2nd Sess. (Jan., 1927), 547-598.

regulate the "time, place, and manner" of elections, it enacted, in 1872, that all congressmen shall be chosen by secret ballot¹ and, in 1873, that congressional elections shall be held throughout the country at the same time, namely, on the Tuesday following the first Monday in November of every second year.² Previously, voting was in some instances *viva voce*, and elections were held at widely varying dates. Candidates are nominated as the laws of the several states provide. In most cases, the direct primary is employed, but in several states the nominations are still made by the old type of district nominating convention composed of delegates representing counties, towns, or other subdivisions.

Contrary to the English practice of referring contested elections to a judicial settlement, our constitution makes the House of Representatives the judge of the "elections, returns, and qualifications" of its members.³ Accordingly, every dispute involving a seat is decided by the House itself. If a candidate is unwilling to concede his defeat, he may ask for and obtain a recount of the votes as provided for in the state election laws, and, further, he may carry his case to the House. According to national law, he must in that event serve notice on the candidate who has been reported elected, giving the grounds on which his contest is to be based; and the person so notified must make a formal reply. The papers are then transmitted to the clerk of the House, who puts the case in shape, reports it, and procures a reference of it to one of the three standing committees which the House maintains for the purpose. The committee weighs the evidence, hears the claimants, takes other testimony if desired, and prepares a report in favor of one candidate or the other, which the House usually accepts. Party considerations are likely to have much to do with the decision, and the English plan of turning over such cases to the judiciary for settlement is better. But, fortunately, contests are not numerous.⁴

Contested
elections

The term of members is two years, which is, therefore, the period of "a Congress." When the constitution was framed, it was the fashion to argue that "where annual elections end, tyranny begins;" and the authors of *The Federalist* found it necessary to

Disadvan-
tages of
the short
term

¹ This does not preclude the use of voting machines.

² By exception, Maine and Arkansas are allowed to hold their elections in September and October, respectively.

³ Art. I, § 5, cl. 1.

⁴ D. S. Alexander, *History and Procedure of the House of Representatives*, Chap. xvi.

devote one of their papers to a defense of the two-year term.¹ Nowadays, it is generally conceded that the term is not too long, but too short. The average person elected to the House for the first time has no acquaintance with the body's methods of doing business, has had no legislative experience, except possibly in a state legislature or a city council, and has only a superficial knowledge of the public affairs with which Congress is called upon to deal. Elected for only two years, he cannot progress far toward becoming a useful member, much less a leader, before his term expires. Most congressmen are, of course, reëlected at least once or twice, and are thus enabled to accumulate considerable knowledge and experience. But the number who serve for only one or two terms is decidedly large.² Furthermore, a member cannot get far into his term before he must turn his thoughts to reëlection. This distracts his attention and divides his energy.

But worse still is the arrangement under which the group of members composing a given Congress do not, as a rule, actually enter upon their duties together until thirteen months after their election. Members are elected, as we have seen, in early November. Their term begins on March 4, following. But unless the new Congress is called in special session during the ensuing spring or summer, it does not meet until time for the first regular session to begin, namely, the first Monday in December. By that date, the term of the members has almost half expired; the next congressional elections are only eleven months distant; and the campaign for renomination is even nearer at hand. Meanwhile, with the new Congress elected and waiting to go to work, the old Congress sits through a full session—from December to March following the elections, usually doing little except to pass necessary appropriation bills. The elections may have shown it to be quite unrepresentative of the present feeling of the country.³ It would be better if a new Congress, coming with a fresh mandate from the people, could begin work a month or two after its election; just as it would be better if a newly-elected president could take

Excessive
interval
between
election
and meet-
ing of a
Congress

¹ No. LIII (Lodge's ed., 333-339). Under the original Revolutionary state constitutions, the members of the state legislatures were elected annually in every state except South Carolina, and there biennially.

² About one-fourth of the membership changes with every Congress.

³ Here is an illustration of how the system sometimes works out: The 65th Congress, elected in November, 1916, with a Democratic majority, met December 2, 1918, and continued to sit until March 4, 1919, although the 66th Congress, with a Republican majority, was elected in November, 1918. A Democratic Congress actively functioned for three months while a Republican Congress-elect was waiting to be organized.

office considerably sooner than he does.¹ The length of the congressional term and the arrangement for congressional sessions are two different matters; the term could be lengthened (to four years, for example) without altering the period between the election and the installation of a Congress, and *vice versa*. At present, however, the unfortunate effects of each limitation is aggravated by the existence of the other.

Four qualifications, including one of a negative character, are required of a representative by the constitution. He² must be twenty-five years of age, or over; he must have been a citizen at least seven years; he must be, at the time of his election, a legal resident for voting purposes (not merely an inhabitant) of the state in which he is chosen;³ and he cannot hold, while a member of the House, any "office under the United States."⁴ The last-mentioned restriction is construed to debar army and navy officers, as well as holders of civil office; and it is hardly necessary to point out that, in debarring cabinet officers, it is the reverse of the unwritten rule in England requiring every minister to have a seat in Parliament.⁵

CHAP.
XXIQualifica-
tions of
members

To these qualifications custom has added one other, namely, inhabitancy of the district represented. Here we come upon another important difference between American and European political usage. In England, for example, members of the House of Com-

Custom
concerning
residence

¹ A joint resolution, sponsored by Senator Norris, proposing a constitutional amendment changing the date of the opening of regular sessions of Congress to the first Monday in January, and the date of the inauguration of president and vice-president to the third Monday in January, thus eliminating the "short" session, passed the Senate four times, by overwhelming majorities, between February, 1923, and January, 1928. The House committee on privileges and elections early went on record in favor of the proposal, but the House itself persistently failed to act, ostensibly because of lack of "an overpowering public demand," until March, 1928, when, after a heated three-days' debate, it gave the plan a vote of only 209 to 157—a majority of course, but not the two-thirds required to put a proposed amendment before the states. It will be noted that Congress itself has power to appoint a different day from the first Monday in December for the opening of the regular annual session (Art. I, § 4, cl. 2). But it could not alter the present date, March 4, of beginning of presidential and congressional terms of office without shortening or lengthening the constitutionally fixed terms of at least one president and the members of one Congress. This it would have no power to do; hence the necessity of a constitutional amendment. See M. A. Mussman, "Changing the Date for Congressional Sessions and Inauguration," *Amer. Polit. Sci. Rev.*, XVIII, 108-118 (Feb., 1924).

² Women are eligible; but it would be pedantic to use cumbersome phrases to denote both sexes throughout our discussion.

³ Art. I, § 2, cl. 1. Cf. the case of James M. Beck in the Seventieth Congress.

⁴ Art. I, § 6, cl. 2. A state office does not disqualify for membership. See W. W. Willoughby, *Constitutional Law of the United States*, I, 529.

⁵ Officers under the crown, other than ministers, are debarred from the House of Commons. F. A. Ogg, *Governments of Europe* (rev. ed.), 97.

mons often sit for constituencies, *i.e.*, districts, other than those in which they live. The last vestige of legal residence requirements disappeared a century and a half ago. A man desiring to enter Parliament, but finding no opportunity in his own district, "stands" in some other district, wherever there is a chance and the party authorities will accept him as a candidate; or a member, defeated in the district which he has represented, turns to another district, in the hope of being kept in public life. His fortunes are not absolutely bound up with any single constituency, and he can afford to take a broadly national view of public affairs. There is nothing in the national constitution or laws to prevent a man from doing the same thing in the United States, save that he could not, of course, become a candidate in any district outside the state in which he lived; and there have been a few such non-resident representatives, mainly congressmen living in the same city in which their districts were situated, but in a different portion of the city, *e.g.*, an uptown representative of a downtown New York district.

Unfortu-
nate effects

In general, however, it is assumed that a representative will be an actual resident of his district, and it is not worth while for an outsider to seek election. Local pride forbids taking a congressman from a different section of the state; only an actual resident, it is felt, will be duly diligent in securing appointments, public buildings, and other favors for the district; only a man whose personal and business interests are bound up with the district can be trusted to stand for what its people want on taxation, tariff, immigration regulation, and other public questions. The case for the home congressman seems to the average citizen absolutely conclusive.¹ Nevertheless, it ignores the intent of the constitution that congressmen shall represent the people generally, and not simply their own constituents; and the requirement works positive harm by cutting off opportunity for good men, living in districts dominated by a different party from their own, to seek a congressional career, by giving an experienced and useful congressman who meets defeat in his district no chance to be returned by another constituency,² and, perhaps above all, by helping to

¹ See Lord Bryce's statement of it and comments on it, *American Commonwealth* (4th ed.), I, 191-195, and *Modern Democracies*, II, 53-55. Cf. H. W. Horwill, *The Usages of the American Constitution* (London, 1925), Chap. ix.

² "A strong man in English politics need never be without a seat in parliament, but the ablest statesman in the United States has practically no chance of a seat in Congress if his own home district should contain a majority of voters who belong to the opposite political party." W. B. Munro, *Government of the United States* (rev. ed.), 223.

keep alive the pernicious concept of the congressman as the district's official agent for procuring offices, grants, and favors.

Several times the question has arisen whether other qualifications than those stipulated in the constitution can be imposed. Legally, they cannot be; practically, they can be. Usage may establish them, as has been explained. And the House may make additions, as it did in 1900, when it refused to seat Brigham H. Roberts, of Utah, on the ground that he was a polygamist, and again in 1919, when Victor L. Berger, of Wisconsin, was excluded because of having been judicially convicted of sedition and disloyalty. These decisions were of doubtful constitutionality. The proper procedure would seem to have been to seat the accused person and then expel him. But the actions taken stand on the record as evidence that, regardless of the theory of the matter, the House, in exercising its constitutional right to judge the qualifications of its members, can impose a test of which the constitution makes no mention.¹

The form given the second branch of Congress was, as we have seen, a product of compromise. To offset the preponderance of the large states in the House of Representatives, small and large states were given equal representation in the Senate; and to provide a counterweight to direct popular influence in the lower chamber, it was arranged that senators, like the president, should be elected indirectly and at longer intervals. Accordingly, the constitution as adopted provided that the Senate should consist of two members from each state, chosen by the legislature thereof for a term of six years.

The extremest demands of the small-state party were not met. Instead of being paid by the states, as was urged, senators are paid out of the national treasury, as are representatives. More important than this, instead of voting by states, as was demanded, they vote as individuals; all states have, indeed, the same number of votes, but the two votes of any given state are cast independently and may be recorded on opposite sides of a question. The Senate is, therefore, constructed on the federal principle, yet is not as completely federal as it might have been made; it is federal

CHAP.
XXI

Can other
qualifica-
tions be
required?

The Senate

Federal
basis

¹ It is the opinion of practically all constitutional lawyers that no state may add qualifications to those fixed by the constitution (*cf.* A. S. Hinds, *Precedents of the House of Representatives*, I, § 415). Nevertheless, some states have sought to require that members shall be residents of the districts they represent, and no clear means appears of setting aside these regulations by legal process. On the Roberts case, see S. W. McCall, *The Business of Congress*, 37-40.

in respect to membership, but not in respect to compensation and voting.

The equality of the states in the Senate required a good deal of defense from the constitution's makers, and in later times it has often been regarded as an unfortunate, if not utterly unjustifiable, arrangement. It is pointed out that, contrary to earlier expectations, there has never been an alignment of states on the basis of size; that cleavages run on other lines, *e.g.*, agricultural as against industrial and commercial states; and that, therefore, the precaution of the framers¹ in the interest of the small states has turned out to be unnecessary. It is complained, too, that since agricultural states are numerous but sparsely populated, while industrial states are few but densely populated, the system results in gross overrepresentation of agricultural and rural interests.² Viewed mathematically, the arrangement undoubtedly abounds in anomalies. New York, with more than ten million people (using the 1920 figures), has two senators; Nevada, with eighty-one thousand, has also two senators. On a proportional basis, New York would have two hundred and seventy senators! Pennsylvania has a million and a quarter more people than all New England; but New England has twelve senators and Pennsylvania two. The five states of New York, Pennsylvania, Illinois, Ohio, and Texas have thirty-six million inhabitants, or about thirty-four per cent of the total population of the continental United States. Yet, in a Senate of ninety-six members, they have only ten, *i.e.*, slightly more than ten per cent.

People who have been troubled by this apparent violation of democratic principle have suggested various remedies, chiefly that a state be allowed one additional senator for every million inhabitants in excess of some fixed number. It is pointed out that this would not mean an exact proportion, such as exists in the House of Representatives, yet would somewhat lessen the inequalities of the present system. At first glance, the proposal seems reasonable. Nevertheless, there are weighty objections to it, as there would be to any other plan for overthrowing the present arrangement. To begin with, there is the almost insuperable difficulty of bringing

¹ Alexander Hamilton believed that there would be no contests between large and small states as such (see Elliot's *Debates*, II, 213), but most of his contemporaries thought otherwise.

² In 1920, fifteen states, containing the principal industrial centers and regions, had more than half of the population of the country. Thirty-three states were predominantly agricultural.

about any change that would impair the equal suffrage of the states in the Senate. Not only would a constitutional amendment be necessary, but, under the provisions of Article V, the express consent of every state, whose representation would become less than that of some other state, would have to be obtained.¹ It is almost inconceivable that this condition could be met. But even if the change could be brought about with no more than ordinary effort, it would be, for several reasons, undesirable. It would certainly lead to substantial increase of the number of senators, thereby impairing the upper chamber's present efficiency as a deliberative and revisory body. The House of Representatives is far too large for effective work except through committees; it would be unfortunate if the Senate were to find itself in the same situation.

In the second place, the change would upset the fundamental balance which representation in Congress now involves. Criticism of the present arrangement commonly springs from the idea that representation, to be worthy of the name, must be based on and proportioned to numbers; whereas there is no essential reason why a senator may not be as truly a representative of five million people as of five hundred thousand, just as the president sometimes better represents the people of the entire nation than do several hundred locally elected congressmen. A leading virtue of the Senate is, indeed, that it does not represent mere numbers. "What gives the Senate its real character and significance as an organ of constitutional government," says Woodrow Wilson, "is the fact that it does not represent population, but regions of the country, the political units [*i.e.*, states] into which it has, by our singular constitutional process, been cut up. The Senate, therefore, represents the variety of the nation as the House does not. It does not draw its membership chiefly from those parts of the country where the population is most dense, but draws it in equal parts from every state and section . . . regions must be represented, irrespective of population, in a country physically as various as ours and therefore certain to exhibit a very great variety of social and economic and even political conditions. It is of the utmost importance that its parts as well as its people should be represented; and there can be no doubt in the mind of any one who really sees the Senate of the United States as it is that it represents the country, as distinct from the accumulated populations of the coun-

CHAP.
XXI

Why the
present
arrange-
ment is
desirable

Opinion of
Woodrow
Wilson

¹ Unless the pledge given the small states should simply be broken, which would be possible enough, but is practically certain never to be done.

try, much more fully and much more truly than the House of Representatives does. . . . The House of Representatives tends more and more, with the concentration of population in certain regions, to represent particular interests and points of view, to be less catholic and more and more specialized in its view of national affairs. It represents chiefly the East and North. The Senate is its indispensable offset, and speaks always in its make-up of the size, the variety, the heterogeneity, the range and breadth of the country, which no community or group of communities can adequately represent."¹ It is an axiom of politics that in a bicameral legislature the two houses ought not to be mere duplicates one of another, but ought to be able to come at public questions with different backgrounds and points of view. Especially, as the author quoted suggests, is this desirable in a nation of the size and heterogeneity of the United States. Representation in one house by numbers and in the other by states is the best guarantee of this balancing of interests that can be devised in a federally organized nation; even though one is obliged to add that, partly as a result of the change to direct popular election and partly for other reasons, the Senate today is actually less unlike the House than it was intended to be or than it was thought by Wilson to be when he wrote in 1908.

Original
mode of
election

Five or six different modes of choosing senators were considered by the constitution's framers. Direct popular election seemed to tend to an excess of democracy and found scant favor. Appointment by the president, with or without nomination by the state legislatures contravened the separation of powers, and was equally unsupported. Election by the House of Representatives, from nominees of the state legislatures, made more appeal, but finally received the votes of only three state delegations. Selection by popularly chosen electors in each state was favored only by Hamilton and a few others. Election by the state legislatures seemed the least objectionable plan and, accordingly, was adopted, with the proviso that if a senatorial vacancy should arise, by resignation or otherwise, while the legislature was not in session, the governor of the state might make a temporary appointment until the legislature's next meeting.² Certain distinct advantages were, indeed, expected from legislative election. Members of the legislature, it was believed, would be likely to know the qualifications of senatorial

¹ *Constitutional Government in the United States*, 114-117.

² Art. I, § 3, cl. 2.

candidates and, being themselves men of substance and responsibility, would elect persons of superior character, and especially of conservative temper. Chosen by the entire legislature, the senator would feel himself the representative, not of a faction or group, but of the entire state. The national and state governments would be brought together in a helpful way, and those people who feared that the strengthening of the former would entail the eventual extinction of the latter would have their apprehensions removed. "An important wheel in the national machine was geared directly to the mechanism of state government so that the state legislature could never be eliminated without bringing down one branch of Congress as well."¹

For three-quarters of a century, each state legislature went about the choosing of senators in whatever manner it desired. In some cases, the houses elected sitting separately, in others, in joint session. Controversies frequently arose, and finally, in 1866, an exceptionally troublesome contest in New Jersey led Congress to exercise for the first time the power which the constitution gives it to regulate the time and manner of senatorial elections.² The act then passed provided for a uniform mode of election, which prevailed throughout the country until 1913, and whose main features can be indicated as follows: The last legislature of a state chosen before the expiration of the term of one of the state's senators proceeded to an election on the second Tuesday after it convened. The houses first took a separate *viva voce* vote, and if any person received a majority in each house, he was declared elected. If no one received such majorities, the houses met in joint assembly at twelve o'clock on the following day and took a *viva voce* vote. If any person received a majority of the votes thus cast, he was declared elected; if not, the process was repeated, at least one vote being taken each day, except Sunday, until an election resulted. In practice, the members of the various parties commonly held a caucus in advance of the election and decided what candidate they would support.³

National regulation was beneficial, but it did not prevent increasing criticism of election by the legislatures. As early as 1826,

¹ W. B. Munro, *Government of the United States* (1st ed.), 148. See G. H. Haynes, *The Election of Senators*, Chap. I.

² Not the place, as in the case of the election of representatives, for the reason that Congress was naturally not to have the power to determine where the legislatures should meet.

³ G. H. Haynes, *The Election of Senators*, Chap. II.

a movement for direct popular election was set on foot, and after the Civil War—notably after about 1885—the demand assumed large proportions. The prevailing system was objected to on several grounds. In the first place, it enabled men to be sent to the Senate who were not worthy of membership in that body, or at all events were decidedly inferior to others who might have been elected. The candidate who could bring the most influence to bear on the members of a legislature, or perhaps on a few who held the balance between party or other groups, was likely to win; and this influence took various questionable forms, not always stopping short of outright bribery. Time and again, elections were controlled by political bosses or by corporations which found this an easy way of influencing legislation at Washington. At best, they ran on purely partisan lines. A second main difficulty was the effect of the system on the legislatures themselves. Party spirit, keyed to a lofty pitch during a senatorial contest, failed to subside when the legislature turned to its regular tasks. Electoral deadlocks were of frequent occurrence, because of the inability of any candidate to attain a majority, and the main business of the legislature was delayed and otherwise interfered with; besides, owing to failure to elect, a state sometimes had only one representative in the Senate for a year or two, or even longer.¹ Even in the election of the legislature by the people of the state, harmful effects appeared, for the contest often turned on the attitude of candidates toward certain senatorial aspirants, rather than on the needs and interests of the state itself.

Discontent with these conditions, reënforced by the general feeling that indirect elections are undemocratic, gradually made the election of senators by the people a leading public question. In 1893 the House of Representatives passed by the requisite two-thirds vote a resolution submitting a constitutional amendment on the subject. The proposal failed in the Senate, and in the next ten years four or five similar attempts came to the same end. In 1892, and again in 1896, the Populist party declared for the change; in 1900 and successive presidential years thereafter, the Democrats put a similar plank in their platform; in 1908 Mr. Taft asserted his personal approval of the proposal in his speech of acceptance, although the subject was not mentioned in his party's platform.

¹Two famous deadlocks of this kind were those in Pennsylvania when, in 1899, a successor to Senator Quay was to be elected, and in Delaware, where Mr. J. E. Addicks kept up a running fight for a senatorship from 1895 to 1903.

More than two-thirds of the state legislatures passed favorable resolutions.¹

CHAP.
XXI

Meanwhile, a number of states evolved a plan under which popular election was secured, to all intents and purposes, regardless of the fate of the proposed amendment. The means employed was the direct primary. By state law, the voters of each party were authorized to indicate at the polls which of the party candidates for a senatorship they preferred, and the nominations thus made were formally reported to the legislature. Usually that body was trusted, without any special precaution, to carry out the public will by electing the designated candidate of the preponderating party. Oregon and Nebraska, however, instituted a system under which candidates for the legislature were asked to pledge their support in advance to the "people's choice," irrespective of party. In either case there was no obligation other than moral; legally, the legislature remained free to elect whomsoever it would. But the popular will was almost invariably carried out; indeed, in 1908 a Democratic senator was elected in Oregon by a Republican legislature. By 1912, senators were popularly nominated in a total of twenty-nine states, scattered throughout the country, and election by the legislatures was fast coming to be quite as much a fiction as is the choice of the president by the electoral college.

Rise of
nomination
by direct
primary

Under these conditions, the opposition in the Senate weakened. Accordingly, in 1912 the Seventeenth Amendment was got through both houses of Congress, and in 1913 it was proclaimed in force. Under its terms, senators are elected directly by the people of the several states; and, as in the case of the House of Representatives, the electors include all persons who can vote for members of the "most numerous branch of the state legislature." If a vacancy arises, the governor of the state issues writs of election to fill it. The legislature may, however, empower him to make temporary appointments; and most legislatures have taken this action.

Popular
election
under the
Seven-
teenth
Amend-
ment

The effects of the change to direct popular election cannot as yet be fully measured. Relief of the state legislatures from the burdens and distractions formerly entailed by senatorial elections has, of course, resulted automatically; these bodies now have a better opportunity than ever before to deal expeditiously and dispassionately with purely state affairs. Of this great gain there can be no doubt. The effect on the Senate itself is less clear; more time will be

Effects of
the new
system

¹The movement is fully described in G. H. Haynes, *op. cit.*, Chaps. v-x, with accompanying bibliography.

needed to reveal it. Certainly the amendment produced no abrupt shift of personnel. Practically every senator who could have expected to be continued in office at the hands of his state's legislature was continued on the popular basis. Furthermore, abuses arising from the lavish use of money in senatorial nominations and elections have not disappeared, as is evidenced by the Newberry controversy of 1918-22, the cases of William S. Vare of Pennsylvania and Frank L. Smith of Illinois in 1926-28, and other somewhat less noted instances.¹ Money is employed in a different way, because it is now the state-wide electorate that has to be reached; but senatorships may still, in effect, be bought.² Certain undesirables, *e.g.*, the virtual appointees of self-seeking capitalistic interests, are now pretty well excluded; but others, *e.g.*, the demagogue and especially the shrewd manipulator of federal patronage, have perhaps a better opportunity than before. Popular election is of itself no guarantee of fitness, and whether, after the generation of members that first came into the upper house by legislative election disappears, and the body comes to be composed entirely of men who were first elevated to its ranks by direct popular vote, it will show a higher level of ability, integrity, and achievement than in the days of Webster, Clay, and Calhoun, or of Allison, Spooner, and Hoar, remains to be determined. The prospect that it will do so is not, it must be admitted, very flattering.

The term of senators is six years. Some of the framers of the constitution favored a longer period; indeed, a few advocated election for life. But to most persons six years seemed sufficiently long to ensure the desired stability and conservatism. The rule puts the senator in a very different position from the representative. Unlike the latter, he has time in a single term to acquire experience, and even to attain a certain degree of leadership; and he can devote himself single-mindedly for several years to public affairs

¹ By a close vote the Senate decided, January 12, 1922, not to unseat Truman H. Newberry, senator from Michigan, for spending \$195,000 in his primary, or nomination, campaign. A resolution of censure, however, declared such expenditure excessive, contrary to sound policy, and dangerous to the perpetuation of free government; and Mr. Newberry subsequently resigned (See p. 641, note 2). By votes of 53 to 28 and 56 to 30, on December 7 and 9, 1927, the Senate refused to seat Vare and Smith, respectively, on charges of improper receipt and use of large sums of money in securing nomination and election.

² A "rider" tacked on a postal salary increase act of 1925 and designated as the "Federal Corrupt Practices Act, 1925," fixed \$25,000 as the maximum sum that a senatorial candidate may lawfully spend in his campaign for election. No attempt is made in the act to regulate expenditure in seeking nomination.

with only incidental thought of reëlection. Most senators, furthermore, have more than one term, and periods of service running to eighteen, or even twenty-four, years are not uncommon. Continuity of personnel produced by long terms and numerous reëlections is further secured by the mode of renewing the membership. The original senators were divided into three classes, with terms expiring in two, four, and six years respectively, and thus an arrangement was instituted under which the terms of one-third of the members expire every two years.¹ The Senate, therefore, never finds itself in the position in which the House of Representatives is found every two years—a new body, with greatly altered membership, obliged to organize from the ground up. On the contrary, it is continuous: considerably more than two-thirds of its members at any given time have served as long as two years; leadership develops slowly and changes seldom; precedents and traditions are carried along on the current of a never-ending stream. It was in the longer term of service and the element of continuity, no less than in the larger power, that Lord Bryce found the reason for the superiority which the Senate early acquired and has long enjoyed over the lower house.²

Senators must be at least thirty years of age, and must have been citizens of the United States at least nine years. Otherwise, their constitutional qualifications are identical with those of representatives: they must be inhabitants of the states that elect them, and they cannot hold any office under the United States. Like representatives, too, they may not at any time be appointed to a civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during the time for which they were elected. Equally with the House, the Senate is endowed with the right to judge the elections, returns, and qualifications of its members,³ and here also the question has arisen whether qualifications can be imposed in excess of those prescribed by the constitution. We have seen that the House has refused to seat a member-elect because he was a

Qualifica-
tions

¹ In no case were both senators of a state placed in the same class, and the senators of states admitted later were always assigned, by lot, to different classes. Hence, barring vacancies arising from death or resignation, only one senator is elected in a state in any given year.

² *Modern Democracies*, II, 59. Cf. p. 422 below.

³ Contested elections are investigated and reported upon by the standing committee on privileges and elections. An investigation sometimes extends over a period of two or three years, e.g., in the Mayfield-Peddy case of 1922-25.

polygamist.¹ Asked to seat a senator-elect who, although not a polygamist, was accused of being an adherent of the Mormon Church, the upper house took what seems to be the better constitutional ground, namely, that any person duly elected and having the qualifications required by the constitution must be received, although he may subsequently be expelled.² Expulsion may be for any cause. But it is to be noted that neither senators nor representatives are commonly regarded as civil officers of the United States, in the meaning of the constitution, and that accordingly they are not subject to impeachment.

Compensation of members of the two houses

Members of both houses have certain constitutional privileges and immunities. In the first place, they are entitled to compensation, at a rate fixed by law, and paid out of the national treasury. Until 1855 they were given only a small per diem allowance, but at that time a salary of \$3,000 a year was authorized, which was increased in 1865 to \$5,000, in 1907 to \$7,500,³ and in 1925 to \$10,000 (in the case of the speaker of the House of Representatives, \$15,000).⁴ Members of the two houses have always been paid at the same rate. In addition to their salaries, they receive liberal allowances for travel, clerk hire, and stationery; and the frank, *i.e.*, the privilege of sending free through the mails any amount of matter stamped with their name, is tantamount to a heavy subsidy, especially in the numerous cases in which the right is abused by the distribution, at public expense, of tons of documents consisting mainly or wholly of speeches nominally prepared for delivery on the floor of Congress, although not necessarily actually delivered, and designed, in any event, for campaign uses.

Privileges of members

Other provisions of the constitution and laws, based on hard-won English usages, are designed to prevent interference with the member's freedom of attendance, speaking, and voting. A senator or representative may be arrested at any time for treason, felony, or breach of the peace—which, as construed, means all indictable

¹ See p. 359.

² In the case alluded to, which was that of Senator Smoot, a resolution for expulsion failed. Members can be expelled from either house by a two-thirds vote. More than a score, in all, have been expelled, most of them on charges of disloyalty growing out of the Civil War. In the Vére and Smith cases mentioned above the argument was naturally made that the Senate should seat the two men, after which, if desired, they might be expelled. The decision to refuse to seat them was somewhat out of line with the precedents, although it was defended on the ground that their election had been irregular, in the sense of involving improper receipt and use of funds.

³ This figure was first reached in 1873, but public disapproval caused a reversion to the former amount within a year.

⁴ On the general subject, see R. Luce, *Legislative Assemblies*, 535-545.

offenses; ¹ so that he has really no exemption from the processes of the criminal law. But while attending a session, or going to or returning from a session, he cannot be arrested on civil process or compelled to testify in a court or serve on a jury. Moreover, "for any speech or debate in either house," he cannot "be questioned in any other place." ² That is, he cannot be proceeded against, outside of the house to which he belongs, because of anything he may have said in the course of debate, committee hearings, or other proceedings properly belonging to the business of the house. He cannot, for example, be sued for libel or slander by a person whom he may have criticized. The privilege is sometimes used as a shield for unwarranted personalities, but it is fundamentally justifiable. If a member knew that he might be proceeded against at law by any person taking offense at his remarks in the exercise of his duties, he would speak and act, in view of the general publicity of congressional proceedings which now prevails, under an altogether undesirable sense of restraint.

REFERENCES

The Federalist, Nos. LII-LXIII.

J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chaps. X, XIII.

———, *Modern Democracies* (New York 1921), II, Chap. xli.

H. L. McBain, *The Living Constitution* (New York, 1927), Chap. vi.

D. S. Alexander, *History and Procedure of the House of Representatives* (Boston, 1916), Chaps. I, xvi.

P. O. Ray, *Introduction to Political Parties and Practical Politics* (3rd ed., New York, 1924), Chap. vii.

E. Kimball, *National Government in the United States* (Boston, 1920), Chap. xi.

W. Wilson, *Constitutional Government in the United States* (New York, 1908), Chaps. iv-v.

W. W. Willoughby, *Constitutional Law of the United States* (New York, 1910), I, Chaps. xxxvii-xxxviii.

F. A. Cleveland, *Organized Democracy* (New York, 1913), Chap. xxvi.

P. S. Reinsch, *American Legislatures and Legislative Methods* (New York, 1907), Chaps. II-III, vii.

R. Luce, *Legislative Assemblies* (Boston, 1924).

E. C. Griffith, *The Rise and Development of the Gerrymander* (Chicago, 1907). Covers the subject to about 1850.

C. O. Sauer, "Geography and the Gerrymander," *Amer. Polit. Sci. Rev.*, XII, 403-426 (Aug., 1918).

¹ *Williamson v United States*, 207 U. S., 425 (1907).

² Art. I, § 6, cl. 1.

- G. H. Haynes, *The Election of Senators* (New York, 1906). A full historical and analytical account.
- , "The Senate: New Style," *Atlantic Monthly*, CXXXIV, 252-263 (Aug., 1924).
- C. H. Kerr, *The Origin and Development of the United States Senate* (Ithaca, 1895).
- L. Rogers, *The American Senate* (New York, 1926), Chaps. II, IV.
- S. W. McCall, "Again the Senate," *Atlantic Monthly*, CXXVI, 395-403 (Sept., 1920).
- C. H. Woody, "Is the Senate Unrepresentative?" *Polit. Sci. Quar.*, XLI, 219-239 (June, 1926).
- S. E. Moffett, "Is the Senate Unfairly Constituted?" *ibid.*, X, 248-256 (June, 1895).
- A Biographical Congressional Directory, 1774-1911*, 61st Cong., 2nd Sess., Sen. Doc. No. 654 (1913). A new edition is in preparation.

CHAPTER XXII

THE ORGANIZATION OF HOUSE AND SENATE

The two houses of Congress are required by the constitution to hold at least one session every year, beginning on the first Monday in December unless a law is passed fixing a different date. As has been pointed out, a shorter interval between election and assembling would be desirable.¹ No one of the many proposals on the subject, however, has as yet been adopted, even though the Senate has repeatedly passed a resolution endorsing an amendment that would bring a new Congress into session two months after its election. In addition to the regular annual sessions, Congress is sometimes assembled in special session, "on extraordinary occasions," at the discretion of the president. Either house may be summoned without the other, and the Senate is often convoked separately to act upon executive appointments or treaties—matters with which, under the terms of the constitution, the House has nothing to do.²

Regular
and special
sessions

Congresses have been numbered consecutively since the first one met in 1789; and it is customary to refer to the sessions of each Congress as the first or second session, as the case may be. When, however, a newly-elected Congress has met in special session before the first Monday in the second December following its election, the sessions are numbered first, second, and third, beginning with the special session. Only once in the country's history has a Congress been called into special session a second time, thus giving it four sessions in all. This was in November, 1922, when President Harding convoked the Sixty-seventh Congress—which already had held a protracted special session in 1921—for consideration of a ship subsidy bill. The first regular session, which begins in December of the odd-numbered years, is called the "long" session, and lasts well into the following summer. The second regular session, opening in December of the even-numbered years, is called the "short" session, since its duration is limited by the fact that the term of its members will expire at noon on the fourth day of March

Long
and short
sessions

¹ See p. 356.

² For the years in which the Senate has been convened in special session, see *Congressional Directory*, 69th Cong., 2nd Sess. (Jan., 1927), 186.

following.¹ Unlike certain European parliaments, Congress is not obliged to remain in session any stated length of time. Unlike these parliaments, too, neither branch can be dissolved, or have its sessions suspended or prorogued by the executive. Subject to the condition that neither house may adjourn without the consent of the other for a period longer than three days, or to any other place than that in which the houses are at the time sitting, the matter of adjournment is left to arrangement between the houses themselves, save only that when they disagree as to the time of adjournment the president may intervene and adjourn them to "such time as he shall think proper."²

A newly chosen House of Representatives, meeting at noon on the first Monday in December, is called to order by the clerk of the preceding House, and this officer continues to preside until the House has elected its regular presiding officer, the speaker, although there is nothing to prevent the members-elect from choosing some other person to act as their temporary chairman if they like.³ After calling the House to order, the clerk proceeds to call the roll of members by states alphabetically. Upon this roll are to be found the names of all members-elect whose certificates of election have been forwarded to the clerk of the House by the proper official in each state. If the right to a seat is claimed by some person other than the one holding such a certificate, the matter is referred for investigation and report, after the House has fully organized, to one of the standing committees on elections.⁴ In the meantime, the person named in the official certificate of election is presumed to have been legally elected, and he participates both in the organization of the House and in its regular legislative work after organization, until such time as it is decided that he is not entitled to a seat.⁵ As the roll-call proceeds, a member-elect may object

¹ Altogether, Congress is in session a great part of the time—usually as many as six hundred days during the two-year period. The longest single session on record was the second session of the Sixty-fifth Congress, which extended from December 3, 1917, to November 21, 1918.

² Art. II, § 3, cl. 1.

³ Ex-President John Quincy Adams was thus chosen under extraordinary circumstances in 1839. See J. A. Woodburn, *The American Republic*, 248-249.

⁴ See p. 355.

⁵ There have been at least three instances in the past decade in which such contests have not been decided until the last week of the term of Congress. Nevertheless, practically full salary was allowed both the successful and the defeated party to each case. See *Searchlight on Congress*, IV, 9-10 (May, 1919); V, 3 (Dec., 1920); V, 8-9 (Mar., 1921). The number of contests has been gradually diminishing. In the Sixty-ninth Congress there were only four; in the Seventieth, the same.

to the admission of some other member-elect on the ground that for some stated reason he is disqualified for membership. Upon the completion of the roll-call, the oath of office is administered to the members in a body, except those whose qualifications have been challenged, as just indicated; they are obliged to stand aside, and the oath is not administered to them until their right to membership has been fully established. Having once taken the oath of office, a member can be cut off from official connection with the House before the expiration of his term only by death, by resignation, by removal from his state, or by expulsion by a two-thirds vote of his colleagues.

CHAP.
XXII

After having taken the oath of office, the first duty of the new House is to complete its formal organization. This ordinarily does not take long—seldom more than a single sitting—although there have been instances in which many weeks were consumed.¹ The first important step is the election of the regular presiding officer, known as the speaker. After that, there is an election of a clerk, a sergeant-at-arms, a doorkeeper, a postmaster, and a chaplain. Each of these officers is obliged to take an oath to support the constitution, and truly and faithfully to perform the duties of his office to the best of his knowledge and ability. In former years, the oath required the officers to “keep the secrets of the House,” but this has become obsolete. Each appoints all of the subordinates connected with his office.² The speaker is chosen by separate oral vote; the other officers are customarily elected *en bloc* by passing a resolution previously agreed to by the caucus of the majority party. None of these officials, not even the speaker, is required by law to be a member of the House; and, as a matter of fact, only the speaker ever is a member.

Election
of speaker

Next in importance to the speaker³ stands the clerk, whose duties are set forth in some detail in Rule III of the House. He is responsible for keeping an accurate record of the proceedings of the House, including all points of order raised and the decisions thereon. This record is printed in the *Journal* of the House, which the constitution requires to be kept and to be published from time to time. Copies of the printed *Journal* are furnished to every member, and are also sent to designated officials in every state. The clerk issues, at the direction of the House, all writs, warrants,

Clerk

¹ For example, in 1855-56.

² House Rule II.

³ The speaker's office is described below (see pp. 376-381).

CHAP.
XXII

and subpoenas; he certifies to the passage of all bills and joint resolutions; he makes contracts for furnishing supplies or labor required by the House; he keeps and pays the stationery accounts of members,¹ and pays the officers and employees of the House their monthly salaries. The performance of these and other duties gives employment to a staff of twelve subordinates, appointed by the clerk himself, including a journal clerk, two reading clerks, a bill clerk, a disbursing clerk, and others.²

Sergeant-
at-arms

The sergeant-at-arms is required to be present in the House during its sittings, and to maintain order, under the direction of the speaker or chairman of the committee of the whole. If for any reason the office of clerk is vacant, the sergeant-at-arms makes up the temporary roll used at the organization of a new House. He also executes the commands of the House, by summoning absent members, serving subpoenas for witnesses, and in other ways. From him members obtain their salaries and mileage allowances, as provided by law.³ Half a dozen subordinates assist him in these various duties.

Other
officers

The doorkeeper enforces the rules regulating admission to the floor of the House, and is required to file with the committee on accounts, at the beginning and end of each session of Congress, an inventory of all furniture, books, and other public property in the committee and other rooms under his charge.⁴ Connected with the office is a staff of more than fifty messengers, clerks, and other subordinates. The postmaster superintends the post-offices maintained in the Capitol and the House office building for the accommodation of members and employees of the House.⁵ His thirty or more assistants attend, among other things, to the collection and distribution of the mail of members of the House. The chaplain is required to be present at the beginning of each day's session, and to open it with prayer.⁶ All of these offices and subordinate positions fall to supporters of the dominant party in the House for the time being; and since party control changes frequently, there is little continuity of personnel, with the result that the work, largely routine but yet important, sometimes suffers.

After the principal House officers have been elected, it is cus-

¹ House Rule III. For the strange things paid for out of these "stationery" accounts, see *Searchlight on Congress*, IV, 8 (June, 1919); V, 6-7 (Dec., 1920); V, 10-11 (Mar., 1921).

² For the complete list see *Congressional Directory*, 69th Cong., 2nd Sess. (Jan., 1927), 249.

³ House Rule IV.

⁴ House Rule V.

⁵ House Rule VI.

⁶ House Rule VII.

tomary for one of the older members of the majority party to move the adoption of the rules of the preceding Congress.¹ If, as is usually the case—any members feel that the rules ought to be changed, this is the time for them to propose alterations; for, once the old rules are re-adopted without change, it is invariably found practically impossible to bring about reforms in procedure, however desirable they may be as a means of making the House a more effective instrument of democratic government. A few spirited attempts have been made in recent years to introduce such amendments at this stage of proceedings. But they have usually proved futile, largely because the older, more experienced, managers of the House profit by the inherited rules, while the newly elected members are too unfamiliar with the rules as they stand to appreciate the importance of a revision.² The old rules having been re-adopted, all farther proposals for change are automatically referred to the committee on rules—a body regularly dominated by tried leaders of what is commonly called the House “machine” and even more hostile to innovation than the average run of members. Any suggested modification which in any way threatens the continued control of these men in House affairs is likely to be promptly smothered by the committee and never heard of again, at least until the next Congress organizes. It is theoretically possible, but usually exceedingly difficult, to compel the committee on rules—or, indeed, any other committee—to report on a matter referred to it, if the committee is itself unfavorable to the proposal. Accordingly, it is likely to prove mere beating of the air to propose important modifications of the rules after the House has completed its organization: the time to accomplish reforms, if any are desired, is at the very opening of the first session of a new Congress.

CHAP.
XXII
Adoption
of the
rules

Although differing in many respects from the regulations governing other parliamentary bodies, the rules of the House of Representatives are, speaking broadly, based upon accepted principles of parliamentary law, upon the rules and precedents of the British House of Commons, and upon the “Manual” prepared by Thomas

Develop-
ment of
the rules

¹ The House rules are printed in full in *Journal of House of Representatives*, 69th Cong., 1st Sess., 897-904 (1925).

² Several important changes in the rules were forced through in January, 1924 (soon after the opening of the Sixty-eighth Congress) by a combination of Democrats and the La Follette bloc. See *Cong. Record*, 68th Cong., 1st Sess. (Jan. 14-18, 1924); also *Searchlight on Congress*, VIII, 10-15 (Dec., 1923), and IX, 13-16 (Jan., 1924); *Cf. Polit. Sci. Quar.*, Supplement, XL, 66-70 (Mar., 1925). Some changes were made also at the opening of the Seventieth Congress in December, 1927.

Jefferson for the guidance of the Senate when he was its presiding officer.¹ Originally, the rules were few in number and easily understood and mastered; today, they are an elaborate and highly complicated code, which few members ever succeed in learning completely. This change has not been the result of periodic general revisions, or of wholesale additions or renovations; for such overhauls have been extremely rare. Instead, to the few and comparatively simple rules with which the House started, new regulations have been added, little by little, to meet special situations as they have arisen from time to time from 1789 to the present day. Even the speaker, who, as presiding officer, is supposed to be thoroughly familiar with the accumulated mass, requires the assistance of an expert parliamentary clerk, who stays at his right hand ready to advise when a difficult parliamentary situation arises. The decision of the various speakers in the course of thus interpreting and applying the rules constitute the *Parliamentary Precedents of the House of Representatives*, which fill eight formidable volumes of a thousand pages each.² Perhaps the most impressive result flowing from these bulky accretions to the rules has been the steadily increasing concentration of control over the time and business of the House in the hands of the leaders of the majority party—the speaker, the majority members of the rules committee, the chairmen of the other great committees, the “floor leader,” the “steering committee”—and the corresponding narrowing of the opportunities allowed the minority to interfere with the carrying out of the program of the majority, either by direct criticism in debate, or by resort to obstructive or dilatory parliamentary tactics, known as *filibustering*.³

Looking somewhat farther at what we may call the formal, or regular, machinery of the House—in contrast with certain important agencies and devices which are not known to the constitution, to the statutes, or to the rules—our attention is at once drawn to the official who, notwithstanding some heavy losses of power, is still the “central figure in the House of Representatives,” *i.e.*, the speaker. The rules require the speaker to take the chair at the

¹ Jefferson's Manual is printed in the different editions of the *House Manual and Digest* and the *Senate Manual*.

² Edited by Asher C. Hinds, long a clerk at the speaker's table (Washington, 1899). A revised edition is being prepared by Congressman C. A. Cannon, of Missouri, who as parliamentary clerk some years ago compiled a supplement and index-digest to accompany a reprinting of the *Precedents* (1919).

³ D. S. Alexander, *History and Procedure of the House of Representatives*, Chap. x.

hour appointed for a sitting of the House, to cause the journal of the preceding sitting to be read, to preserve order and decorum, and, in case of disturbance or disorderly conduct, to cause the galleries to be cleared. He has general control over the hall of the House and of unappropriated rooms in the House wing of the Capitol. He signs all acts, addresses, joint resolutions, writs, warrants, and subpoenas ordered by the House; decides all questions of order, subject to an appeal by any member;¹ puts all questions to a vote; and appoints select and conference committees authorized from time to time by the House. As a member of the House, he retains the right to vote on any question, though the rules provide that he shall not be required to vote "except where his vote would be decisive," or when the House is voting by ballot.² He may appoint any other member to serve as presiding officer in his place, for a period not to exceed three days, except in case of illness, when the substitution may be made for ten days; and when he is absent and has failed to provide a substitute, it is permissible for the House to elect a speaker *pro tempore*.

CHAP.
XXIIMiscel-
laneous
powers

The foregoing list of powers and duties conveys only a very imperfect idea of what the speakership has meant in our national legislative history. The office itself, like so many others, was inherited from English political practice by way of our own colonial experience. For centuries, the speakership of the English House of Commons has been an exceptionally dignified and important institution; and an official, bearing the same title and exercising many of the same powers, not only appeared in colonial assemblies and state legislatures prior to the adoption of the constitution, but is found in every one of our state legislatures today. The framers of the national constitution left later events to determine which sort of a presiding officer the speaker of our national House of Representatives should become—whether, like his English prototype, an impartial presiding officer, a moderator of markedly judicial temperament, wholly unidentified with any partisan group within or without the body over which he presides; or an official conforming to the type of speaker which had already developed in American colonial and state legislatures, *i.e.*, an official who, whatever other qualities he might possess, was first and last a

English
and
American
speakers

¹ The rulings of the speaker of the British House of Commons, on the other hand, cannot be questioned. "The chair, like the Pope," a former British speaker humorously remarked, "is infallible." Rarely are the decisions of the American speaker actually overruled.

² House Rule I, § 6.

CHAP.
XXIIFormer
importance
of the
speakership

political leader and an active partisan. As a matter of fact, congressional speakers, almost from the outset, turned out to be officials of the latter sort; and until within the past two decades, they furnished, in a conspicuous degree, that official political leadership in legislative affairs which is nowhere provided for in our constitutional system, but which in England is supplied by the cabinet. Indeed, until after 1910, the speaker held a position of importance second only, in point of political influence, to that of the president; while in the field of legislation, his influence at times even exceeded the president's.¹

To this remarkable development of the speakership several different, although related, factors contributed. In the first place, with but few exceptions, the speakers have been men endowed with natural qualities of leadership, which have brought them to the front in their respective parties even before their elevation to the speakership; in proof of which one needs but to glance over the long list of persons who have held the office and observe the names of Henry Clay, James K. Polk, Robert C. Winthrop, Schuyler Colfax, James G. Blaine, Samuel J. Randall, John G. Carlisle, and Thomas B. Reed. Despite the high political importance which has attached to the office in times past, however, only one speaker ever succeeded in reaching the presidency, although Blaine narrowly missed it. This result has not been altogether fortuitous; for whoever holds the speakership runs grave risks of rousing antagonisms within his party, as happened notably in the case of both Blaine and Reed, and this, of course, makes the attainment of the presidency difficult or impossible.

Prerogatives of the
speaker:1. Deciding
questions of
parliamentary law

Personality and standing as a party leader may account for the promotion of an individual to the speakership, but they only partially explain the extraordinary power and influence which the speakership, as an office, early developed and to a considerable extent retains. The reasons for this impressive accumulation of authority are to be found in certain of the speaker's well-known prerogatives. In the first place, the speaker, as has been stated, has the right not only to put questions and announce votes, but to rule members out of order and decide the multifarious questions of parlia-

¹ The American conception of the speakership, today as well as formerly, is very well expressed in Speaker Longworth's statement, upon his election to the office in 1925: "I believe it to be the duty of the speaker, standing squarely on the platform of his party, to assist in so far as he properly can the enactment of legislation in accordance with the declared principles and policies of his party and by the same token to resist the enactment of legislation in violation thereof." *Cong. Record*, 69th Cong., 1st Sess., p. 382 (Dec. 7, 1925).

mentary law that arise. Appeals can be taken from the chair's decisions, but they are infrequent and can rarely be carried when raised by a minority member or element.

CHAP.
XXII

In the second place, the speaker wields the important power of recognition. Unless formally recognized by the speaker, no member can obtain the ear of the House. This privilege the English speaker endeavors to extend impartially to members of all parties; but the American speaker feels himself under no obligation so to do. To be sure, he is bound to follow the rules of the House, and the rules give a certain precedence to some committees or to their chairmen, and certain days are set apart for the consideration of special classes of business.¹ But with all due allowance for such limitations, the speaker still has much leeway for exercising his own discretion in granting the floor to members. Again and again, when members have sought to obtain recognition without having previously arranged with the speaker to be recognized, that officer has inquired, "For what purpose does the gentleman rise?"—and then has decided whether or not to recognize him, according to whether the member's purpose met with the speaker's approval. In this way speakers have often been able to prevent all consideration of motions and bills to which they personally, or the groups to which they belonged, were opposed.

2. Recognizing members

A favorite expedient of members who want to obstruct the adoption of a measure, or to wear down opposition, is to offer motions designed solely to use up time. Confronted with a situation in which a vigorous Democratic minority seemed likely to make legislation practically impossible, Speaker Reed in 1890 hit upon the plan of refusing to entertain motions which he regarded as dilatory; and before the end of the year the House, agreeing with him that "the object of a parliamentary body is action, not the stoppage of action," embodied the new policy in a formal rule which is still in force. Such a rule cannot, however, prevent members from slowing up business by exercising their constitutional right to demand the yeas and nays, even though the purpose be plainly dilatory.² Another familiar obstructive practice of minority groups in earlier times was to leave the House short of a quorum, by refusing to answer to a roll-call designed to determine whether

¹ See p. 403.

² Art. 1, § 5, cl. 3. The yeas and nays are not required to be entered in the journal unless one-fifth of the members so request. For a list of motions which on occasion have been considered dilatory, see *House Manual and Digest*, § 785.

a quorum was present. Speaker Reed overcame this difficulty of the "disappearing quorum," also, in characteristic fashion, by instructing the clerks to count as present all members physically present, whether they answered to their names or not; and this procedure also found a permanent place in the adopted rules.¹

Another prerogative, which formerly added immensely to the speaker's power, was his right to appoint all committees. Although a sense of obligation to influential leaders who assisted in his election to the speakership, and loyalty to the traditional seniority rule governing committee promotions, tied his hands to some extent, abundant opportunities remained to advance the political fortunes of his friends by appointing them to important committees, and, on the other hand, to inflict punishment upon those who incurred his displeasure, by relegating them to unimportant committees, some of which, for lack of anything to do, had not met for decades. At the same time, the speaker could make up committees having charge of leading measures, like tariff and appropriation bills, in such a way as to have a decisive influence upon both the form and the fate of these measures. Especially important was the power to appoint the most highly privileged and most powerful standing committee of all, namely, the committee on rules, with which went, also, the right to serve as that committee's chairman.²

Concentration of such powers in the hands of dominating personalities and recognized party leaders virtually converted the speakership in the days of Reed and Cannon into an instrument of autocratic control over the destiny of both men and measures.³ The number of members who chafed under the yoke of "Cannonism," as the system came to be called, increased year by year with the growth of the progressive movement in the ranks of the Republican party; and, after long waiting, a promising opportunity to rise in revolt appeared in March, 1910. At that time, a combination of "progressive" Republicans and the Democratic minority, after a prolonged and dramatic session, succeeded not only in deposing Speaker Cannon from membership in the committee on rules, but in enlarging that committee from five to ten members,

¹ R. Luce, *Legislative Procedure*, 37-46; D. S. Alexander, *History and Procedure of the House of Representatives*, 158-178.

² See p. 385.

³ W. B. Hale, "The Speaker or the People," *World's Work*, XIX, 12805-12812 (Apr., 1910). For a defense of the system see J. G. Cannon, "The Power of the Speaker: Is He an Autocrat or a Servant?," *Century Mag.*, LXXVIII, 306-312 (June, 1909).

in the hope of making it somewhat more representative of party sentiment in the House; and at the same time the speaker was deprived of the right to appoint the committee. When the next Congress organized, in the following year, the speakership was stripped completely of the power of appointment, except in the case of select and conference committees.¹

Exclusion from the rules committee and loss of the right to appoint standing committees left the speaker in a perceptibly weakened position. The great powers of allowing members the floor or refusing it to them, refusing to put motions deemed to be dilatory, ruling members out of order, and deciding vital questions of procedure, however, remain—together with a certain amount of appointing power and sometimes important power of reference, *i.e.*, the power to decide to what committee a public bill shall be referred, provided the clerk of the House (who normally makes the assignments in accordance with the nature of the bill) is in doubt. So that, if the speaker no longer rules with the rod of a Reed or a Cannon, he is still a force of the first magnitude in the actual work of legislation.²

When a body of more than four hundred members finds itself obliged to dispose of thirty thousand or more bills and resolutions biennially, some form of division of labor, some method of sifting the avalanche of legislative proposals, is certain to be devised. The answer to the problem in the present case is the committee system, under which the entire membership of the House is divided at the opening of each Congress into small groups—miniature legislatures, they have been called—each group or committee handling a special class of measures. These “standing” committees last two years, but in addition select committees are sometimes appointed to deal with specific matters, and there are also, from time to time, conference committees whose function is to confer with similar committees of the Senate on legislation on which the two houses have been unable to agree.³

Originally, the standing committees were few in number. But,

¹ C. R. Atkinson, *The Committee on Rules and the Overthrow of Speaker Cannon* (New York, 1911); C. R. Atkinson and C. A. Beard, “The Syndication of the Speakership,” *Polit. Sci. Quar.*, XXVI, 381-414 (Sept., 1911).

² G. R. Brown, *The Leadership of Congress* (Indianapolis, 1922), Chaps. x-xi; D. S. Alexander, *History and Procedure of the House of Representatives*, Chaps. iv-v. A sketch of the varying fortunes of the speakership since the changes of 1910-11 will be found in P. D. Hasbrouck, *Party Government in the House of Representatives* (New York, 1927), Chap. I.

³ See pp. 413-415.

CHAP.
XXIINumber
and impor-
tance of
committees

partly owing to the increase of legislative business, partly on account of the supposed necessity of giving members the dubious distinction of holding a committee chairmanship (of what committee, matters little to many members), and thus enjoying the reputation and the perquisites, or spoils, that go with committee chairmanships, and partly owing to the natural tendency, once a given committee was established, to continue it regardless of its usefulness, the number grew until it reached a maximum, some years ago, of sixty-one. At the opening of the Seventieth Congress (December, 1927) there was, however, a long-needed trimming of the list, which left the number at forty-six.¹ Even of the survivors, only about a dozen can be said to be of large importance: chiefly the committees on ways and means, appropriations, judiciary, banking and currency, interstate and foreign commerce, rivers and harbors, post-offices and post-roads, agriculture, military affairs, naval affairs, and rules. Now and then something arises to give temporary prominence and importance to other committees, as happened in the case of the committee on foreign relations when the United States entered the World War; and a few committees which are now seldom heard from were, in times past, of great importance, for example, the committee on territories.

Size of
committees

In size, House committees range all the way from two members up to thirty-five, in the case of the reorganized committee on appropriations.² Members rarely serve on more than three standing committees, and the majority belong to only one.³ Twenty-three of the most important committees meet regularly on certain days each week; the others meet, if at all, at the call of the chairman. On every committee both parties, and sometimes third parties, are represented; but the dominant party always has a safe working majority, usually of from three to seven members.

Mode of
appoint-
ment

The chairmen and other members of these standing committees are formally elected by the House at the beginning of each Congress; actually, however, they are designated by the respective party caucuses (to be described below), in accordance with "slates" prepared by certain authorized agencies. From the organization of the government down to 1911, the right to make up the standing committees of the House was, as we have seen, a main prerogative

¹ A list of House committees, with their membership in 1928, is printed in *Congressional Directory*, 70th Cong., 1st Sess. (Jan., 1928).

² See p. 506.

³ Under present practice, members placed on any one of the ten or more major committees are never given any other standing-committee assignment.

of the speaker. During the eight years of Democratic ascendancy following the date mentioned, this power, however, was exercised by the regular committee on ways and means, subject to the approval of the majority and minority caucuses. The majority members on this committee were chosen in the majority caucus at the opening of each new Congress; the minority members of the committee were similarly chosen in the minority caucus. The chairman and other majority members of all the remaining committees were then selected by the majority members on this "committee on committees," and the minority members on each committee were in a similar manner named by the minority of the committee on committees. Then the action of these two groups, having first been approved by their respective party caucuses, was reported to the House, which proceeded formally to "elect" the committees thus chosen. In the second Congress after this innovation was introduced, the Republican minority caucus delegated to its floor leader complete authority to assign all the minority committee positions.

CHAP.
XXII

The committee on ways and means¹ thus continued to serve as a committee on committees until the Republicans regained control of the House in 1919 and, by caucus action, created, for their own use, a special committee along new lines.² This new committee on committees was made to consist of one member from each state having Republican representation in the House, which meant at that time a committee of thirty-six members. Furthermore, in making committee assignments, each member was permitted to cast a number of votes equal to the number of Republican representatives from his state. This resulted, in 1919, in giving the various members of the committee of selection all the way from one to twenty-nine votes; only ten members had as few as one or two votes, while nine had more than ten votes apiece. The Republicans still adhere to this plan, the Democrats, on their part, continuing to employ as their organ of selection the Democratic members of the ways and means committee, constituting, to all intents and purposes, a Democratic committee on committees.

New form
of commit-
tee of
selection
(1919)

The method followed in allotting committee chairmanships and arranging committee members in a recognized order of priority permits little or no consideration to be given to experience, training, or other qualifications. Disregarding these matters almost

Seniority
rule

¹ The chairman of this committee was also the majority floor leader until 1919. The minority floor leader has usually been the party's unsuccessful candidate for the speakership in that Congress.

² *Searchlight on Congress*, IV, 3-6 (May, 1919).

entirely, the committees and caucuses, except at rare intervals—especially when questions of party “regularity” are involved—¹ religiously adhere to the traditional rule requiring all chairmanships, and indeed committee positions generally, to be assigned on the basis of seniority, *i.e.*, length of continuous service in the House. A new member has thus practically no chance of securing the chairmanship of a single committee, even though he be a man of the most preëminent ability. Indeed, he counts himself fortunate if he secures the lowest position on a committee of secondary, rather than of tertiary, importance. The names of new members are almost always placed at the bottom of the committee rolls, both on the majority and the minority side of the House. If a member succeeds in being reëlected several times, he will gradually make his way up toward a chairmanship. When finally he stands next to the chairman of a given committee in point of seniority, he is spoken of as the “ranking member;” and when the next vacancy occurs in the chairmanship his claim, based upon length of service and perhaps nothing more, will be held superior to all other claims, provided his party is still in control of the House, and provided, further, that his own record in the House has been marked by a satisfactory degree of “regularity.”²

The nature of the legislative measures assigned to the important committees mentioned above is sufficiently indicated by the committee titles, except, perhaps, the committees on ways and means, appropriations, and rules. The committee on ways and means has charge of all taxation, including tariff, measures.³ The committee on appropriations, reorganized in 1920, now has jurisdiction over all appropriations, and is frequently referred to in the press as the budget committee. The rules committee is probably to be regarded as the most powerful of all regular House committees, partly because of the inherent nature of its functions, and partly because, along with ten other committees, including those on ways and means and appropriations, the committee on rules enjoys the advantage of being permitted to report to the House at any time. “It shall always be in order,” runs House Rule XI, “to call up for consideration a report from the committee on rules, and,

¹ As, for example, in the case of the “Republican” members who supported Mr. La Follette for the presidency in 1924.

² Hashbrouck, *op. cit.*, 48-55. For a thoughtful defense of the seniority principle see J. K. Pollock, Jr., “The Seniority Rule in Congress,” *North Amer. Rev.*, CCXXII, 235-245 (Dec., 1925—Feb., 1926).

³ See p. 489.

pending the consideration thereof, the speaker may entertain one motion that the House adjourn; but after the result is announced he shall not entertain any other dilatory motion until the said report shall have been fully disposed of.”¹

The committee on rules was first made a standing committee in 1880, though not until some years later did its potentialities as an organ of majority control begin to be realized. Successive rulings of the speaker and orders of the House gradually invested the committee with power to control practically the entire order of business, by means of special rules to meet special situations as they arose—in particular, rules or orders calling up a particular bill for immediate consideration. Prior to the revolution of March, 1910, the speaker not only served as chairman of this committee, but appointed the other four members, who were naturally men of disposition and opinions similar to his own. He, with the chairmen of the ways and means and appropriations committees, entirely dominated it, and it was Speaker Cannon’s official connection with this committee, and the highly privileged character of the special orders which it brought in, that enabled that picturesque figure to wield well-nigh absolute control over all important legislation, and almost literally to determine what might and what might not be considered by the House. The speaker’s withdrawal from membership in the committee, the transfer of the actual selection of its members to party caucuses, and the increase of these members to ten, and later to twelve (eight representing the majority and four the minority), left the speaker with perceptibly diminished power but did not of themselves lessen the control of the committee over the legislative work of the House. As we shall see, that control has in later days been cut down somewhat in actual practice by the rise of two new agencies of the majority caucus, the “steering committee” and the majority floor-leader, with the result that, aside from the chairman, the members of the committee are no longer, as they once were, the dominant personalities of the House. But inasmuch as the rules committee is commonly the medium through which these authorities accomplish their purposes, the committee is still to be regarded as an instrumentality of great potency and importance. Not only may it, through special orders, limit the time of debate allotted to measures, but it may specify what sections

¹ In practice, this rule has been modified somewhat. A report of the committee on rules is not in order when the House has voted to go into committee of the whole; also a conference report has precedence over it.

can be amended, and the number, and even the nature, of permissible amendments.¹ Moreover, it may at any time interrupt the discussion of a measure and, by another special rule, thrust forward some other bill for consideration. Insurgents now and then catch the House managers napping, and succeed in getting a certain bill before the House contrary to the intentions of the "machine." But in such an emergency, the committee on rules can always be hurriedly convened and a special rule to meet the situation quickly devised and reported, not only interrupting consideration of the insurgent measure, but indefinitely side-tracking it in favor of other business. Furthermore, the committee on rules has been known to draft a bill over night, introduce it in the House the next morning, and force its passage the same day, without any opportunity whatever for reference to a standing committee.² In so far as this sort of thing takes place, the House has virtually abdicated its rights as a deliberative law-making body.

The speaker and other officers, the committees and their chairmen—even the powerful rules committee—are agencies of the House as such, designed to enable it to carry on business expeditiously and effectively. This formal machinery is, however, only part of the mechanism of House control. Enveloping it, and frequently excelling it in actual power, is an "invisible government" springing from party practice and quite unknown to the rules. This extra-legal government consists primarily of the party "conferences," or caucuses, but includes two further instrumentalities created by the caucuses, *i.e.*, the majority party's "steering committee" and the majority and minority floor leaders.³

The caucus is a private meeting of the members of the House who belong to a given party. Long before 1910, such gatherings were quite familiar, on the part of both majority and minority groups. But it was after the "revolution" of that year and the succeeding one—to be more explicit, after the speaker's loss of power to appoint committees—that the caucus, especially of the majority party, acquired its remarkable grip upon House organi-

¹ Special orders of this sort are sometimes called "gag-rules." Their use has increased rapidly in recent years. See *Amer. Polit. Sci. Rev.*, XIX, 764-765 (Nov., 1925).

² As happened in the case of a ship subsidy bill in 1915. See L. Haines, *Your Congress*, 94-96.

³ The term "caucus" has fallen somewhat into disrepute among congressmen in recent years, and has tended to be superseded in reports and discussions by the term "conference." The device is the same, however, by whatever name designated.

zation and procedure. Nowadays, the operations of the majority caucus extend—at all events may extend—to not fewer than five important matters: (1) the selection of House officers; (2) agreement upon plans for united action on policies or measures before the House; (3) listing of members to be elected to the various standing committees; (4) supervision and control of the reports of important committees; and (5) the actual shaping of the detailed provisions of leading legislative measures.¹

The constitution provides that the House shall elect its speaker and other officers; and in form the regulation is complied with, as we have seen. Actually, however, what the House does is merely to ratify the slate of officers previously agreed upon in the secret, unofficial, caucus of the majority party;² and, in view of the strictness of party discipline which usually prevails, the decision of a majority of that unofficial body determines the formal action of the House as a whole.³ It has long been quite possible, therefore, for a member to be elected speaker who is not favored by a majority of the House as a whole, especially when there has been a close caucus vote in the choice of candidates. In other words, owing to the binding nature of caucus decisions, it is possible for a minority of the entire House to dictate the choice of this most important House officer.

The use of the caucus to bring about united action of the party members in supporting or opposing measures of large importance, after they have come before the House, reaches far back in our legislative history. But to this, and the foregoing function, later developments have added others no less weighty. First of all, the majority caucus inherited the speaker's power of appointment. At the same session when this devolution occurred, the majority caucus assumed, also, the right to review and control the action of

CHAP.
XXII

Selection
of the
speaker
and other
officers

Prelimi-
nary consid-
eration of
bills

¹ W. H. Haines, "The Congressional Caucus of Today," *Amer. Polit. Sci. Rev.*, IX, 696-706 (Nov., 1915).

² This caucus may be held long in advance of the date of formal organization of the new Congress. Thus the Republican members of the Sixty-ninth Congress (which was expected to be—and actually was—organized in December, 1925) met on February 27 preceeding, during the closing days of the Sixty-eighth Congress, and by a vote of 140 to 84 "nominated" Mr. Nicholas Longworth, majority floor leader, for the speakership. Organization of the Democratic minority was effected on the following day, and the floor leader, Mr. F. J. Garrett, was selected to oppose Mr. Longworth for the speakership. The Republican committee on committees, also, met on March 5 and took up the task of assigning Republican members to the various standing committees. Similar procedure was followed in 1927 in preparation for the Seventieth Congress.

³ The vote on the caucus nominees for speaker has come to be the critical test of party allegiance.

the most important committees before they reported to the House. This was accomplished by the adoption of a resolution in the Democratic majority caucus, in April, 1911, which directed the Democratic members of the various committees of the House not to report to that body on important legislative measures until they had first communicated their proposed action to the caucus and had received permission from that body to report. Shortly after this, we find the majority caucus debating the details of important bills, and even assuming the task of perfecting the provisions of legislative measures before those measures were brought up for consideration on the floor of the House. Thus, every important provision in the Glass currency bill of 1913 (afterwards enacted as the Federal Reserve Act), and also of the Clayton anti-trust bills passed in the following year, was whipped into final shape in the Democratic caucus before the bills appeared in the House at all.

Two of the principal instrumentalities through which the majority caucus functions are the steering committee and the majority floor leader. The steering committee consists of a varying number of leading majority members (eight at present, including the floor-leader as *ex-officio* chairman), chosen by the majority caucus to exercise steady supervision over the handling of business by the House. Sometimes the committee is made up specially for the purpose; sometimes it comprises simply the majority members of one of the great standing committees, *e.g.*, the ways and means committee, designated by the caucus; but in any event it keeps an eagle eye on proceedings, whips faltering members into line, and in sundry effective ways sees that the will of the caucus is carried out. The committee's main business is to select from the great mass of bills which encumber the House calendars those which the majority managers wish to advance to final consideration, its work becoming especially important in the last crowded days of a session. Its meetings are regularly held in the office of the speaker, and are attended by the speaker, the chairman (or some other member of the rules committee), and such other committee chairmen as may be called in from time to time. The selection of measures having been made, the steering committee relies upon the rules committee to get them before and through the House in a form satisfactory to the leaders.¹

¹Speaking in the House on June 18, 1926, Mr. Pou, ranking minority member of the rules committee, declared: "It cannot be denied that the steering

The chairman of the steering committee—also designated by the caucus—is the floor leader; and at the present time this extra-legal dignitary is almost equal in power to the speaker, from whom, indeed, he has inherited many prerogatives. He keeps informed on the drift of opinion among his colleagues, persuades and admonishes in the interest of party harmony, plans the course of debate and indicates to the speaker what majority members are to be given the floor on particular measures, and confers with the minority leader—for the opposition has a similar leader, usually its unsuccessful candidate for the speakership, and, of course, chosen by the caucus—on the time at which votes shall be taken. A few years' career as floor leader, such as the present speaker, Mr. Longworth, had, is usually the best asset of a candidate for the speakership.²

CHAP.
XXII

Obviously, therefore, a person who views House organization and procedure merely through the medium of the official machinery and the formal rules is in danger of missing much that goes to make up the actualities of congressional lawmaking and finance. Indeed, it is far from easy for an outsider to appreciate the dominant position which the caucus and its agencies now hold. To understand it, one must have some notion of the effectiveness of party discipline in a body elected, organized, and largely conducted on strictly party lines. The caucus is naturally controlled by a comparatively small group of experienced leaders, well versed in the intricacies of House procedure and skilled in the art of managing their less experienced colleagues; and in their hands it has become an instrumentality through which the rank and file—especially the newer members, unfamiliar with the ways of the House—are kept in strict tutelage. All party members, whether in attendance at a caucus or not, are bound by the action taken unless released by the caucus itself, and the only grounds upon which members are likely to be released are constitutional objec-

Power
of the
caucus

committee is all-powerful. It can and does forbid the consideration of any measure to which a majority of the steering committee is opposed. This may be a surprising statement to some, but the steering committee is more powerful than any of the regular constituted committees of this House. It is more powerful than the committee on rules, because the majority of the committee on rules will not report any special rule in defiance of the mandate of the steering committee, which is the great super-committee of this House, with power to kill and to make alive." *Cong. Record*, 69th Cong., 1st Sess., Vol. LXVII, p. 11528.

²On the floor leaders, see D. S. Alexander, *History and Procedure of the House of Representatives*, Chap. VII, and on the "invisible government" of the House, G. R. Brown, *The Leadership of Congress*, Chap. XII.

tions or pledges to constituents to take a different course from that decided upon by the caucus.¹ Any one who refuses to abide by a caucus decision—who, in other words, commits the unpardonable sin of “bolting”—takes his political life in his hands, and can expect to be marked for discipline in various effective ways. He is likely to lose his place on important committees when the next committee assignments are made; the measures in which he has a peculiar personal interest will probably be side-tracked; appropriations to be expended in his district may be cut off, or sharply curtailed; and in various other ways he may be made to feel the wrath of the leaders for his refusal to “go along.”

Needless to say, the power of the caucus and the ways in which it is used stir much discontent. The stifling of individual initiative, the penalizing of independence, the relentless use of the “steam roller,” drive members to insurgency and inspire attempts to build up *blocs* which will cut across caucuses and party lines. The simple fact is that, although the effective functioning of such a body as the House of Representatives presupposes leadership, no provision whatsoever for congressional leadership is made in the constitution or the laws. Under parliamentary systems of government, legislative leadership devolves naturally upon the cabinet. But our government is not of that sort, and it has fallen to the House to work out its own problem in this respect. It has done this, according to no preconceived plan, but largely as the exigencies of party politics have determined. The results have been different in different periods. Once it was the speaker who guided. Again, it was the speaker and the rules committee; still again, the ways and means committee; and now it is chiefly the caucus and its agents—which means that leadership is “in commission.”² Always there has been dissatisfaction on the part of individuals and elements that have found themselves with less independence and power than they felt they ought to have; revolt has followed revolt, only—speaking broadly—with the result, at best, of transferring supreme control from one point in the system to another, *e.g.*,

¹ The action of a Democratic caucus, it should be noted, is binding upon members only if two-thirds have concurred.

² “Speaker Cannon could promise Roosevelt that the House would do certain things and the things would be done. There is no one now in the House to make such promises. Its control is shared by the floor leader, the speaker, the rules committee, the committee on committees, the steering committee, and the chairmen of the more important legislative committees. The president will find it difficult to lead the House if there are no authoritative agents with whom he may deal.” L. Rogers, in *Amer. Polit. Sci. Rev.*, XVIII, 92-93 (Feb., 1924).

from the speaker to the caucus. Presidential leadership, exerted from the outside, sometimes counts for much. But whether it is forthcoming or not, the House must find leadership in its own ranks; and the quest for a leadership that will not be also a dictatorship goes on unceasingly.

CHAP.
XXII

The present scheme of things does not, of course, lack apologists, and some of their arguments have a good deal of weight. There must be rules, they say, and these rules will inevitably seem harsh and arbitrary to men in a hurry to make the world over by act of Congress. But the rules as they stand must be taken as reflecting the wishes of the majority of the members. A dissatisfied majority can change them at any time. An arbitrary speaker can be overruled, or even deposed, by a majority vote. Committees may be reconstituted and compelled to report upon any matter referred to them, by a procedure which can be started by petition of a majority of the members. Therefore, runs the argument, since the rules and other features of the system remain substantially unaltered from Congress to Congress, they must be regarded as fairly satisfactory to all but a few unreasonable members who are unable to adapt themselves to the ways of the majority.

Is the
system
justifiable?

Speaking strictly, all this, of course, is true. Nevertheless, the argument contains a fallacy. The majority referred to is usually fictitious; the existence of the two rival party organizations, functioning through caucus action, in which the influence wielded by the experienced managers who profit by the old system is decisive, makes House majorities for any of the purposes named practically impossible. Actually, the degree of independence enjoyed by individual members—except such as are willing to be labelled insurgents—is extremely small. Opportunities, in connection with really important matters, to act solely as their best judgment dictates rarely arise; and situations in which a coalition is feasible between a united minority party and a dissatisfied or insurgent faction within the dominant party are still more uncommon. It is, therefore, nearer the truth to say that the rules of the House, the power wielded by the speaker and the committees, and consequently the fate of many weighty bills, are in reality determined, not by the majority of the entire House, but rather by the majority in the caucus of the dominant party, which may in fact represent the views of only a minority of the House as a whole.

CHAP.
XXIIOrganiza-
tion of the
Senate

The organization of the Senate differs from that of the House in a number of respects. In the first place, the Senate is a permanent body, the terms of only one-third of its members expiring at a given time; whereas the terms of all members of the House end simultaneously. It is, therefore, possible for the entire membership of the House to change every two years, while it is possible for only about one-third of the membership of the Senate to change in the same period. Being thus a permanent body, the Senate is not obliged to go through a formal process of organization every two years, such as takes place in the House at the opening of every new Congress. The Senate has been continuously organized since it first convened in 1789.

Presiding
officer—
the vice-
president

Secondly, the Senate's presiding officer, *i.e.*, the vice-president of the United States, is determined for it by the constitution; consequently, there is no partisan or factional contest over the control of that position.¹ Furthermore, the vice-presidency carries with it none of the power over Senate deliberations which is associated with the speakership in the House. Not being a member of the Senate, the vice-president may not vote on measures coming before it, except to break a tie; otherwise, it would happen that the state from which he came would have three votes—his own and those of the state's two senators. From April, 1789, when the Senate first organized, to March 4, 1915, there were one hundred and seventy-nine instances of the use of the casting vote, by twenty-one different vice-presidents, the great majority occurring in connection with comparatively unimportant matters.² As a presiding officer, the vice-president much more nearly resembles the English speaker, or better, the Lord Chancellor, who presides in the House of Lords, than does the speaker of the House. He is simply a presiding officer, or moderator. As such, he puts questions to a vote, recognizes members, and decides points of order, subject to appeal by any senator, and even leaving specially difficult questions of order to the decision of the Senate itself. Unless the vice-president is a person of extraordinary force, which rarely has been the case, and also of high standing in his party, he never seeks to

¹ The Senate, however, elects a president *pro tempore* to serve in the absence of the vice-president.

² These instances classify as follows: in connection with nominations 13; treaties, 3; elections of officers and questions of organization, 7; procedure, 39; bills and resolutions (general), 91, (local) 5, and (private) 21. H. B. Learned, "Casting Votes of Vice-Presidents," *Amer. Hist. Rev.*, XX, 571-576 (Apr., 1915); *ibid.*, "Some Aspects of the Vice-Presidency," *Amer. Polit. Sci. Rev.*, Supplement, VIII, 162-177 (Feb., 1913).

play the rôle of a political leader in the Senate, much less to influence senatorial action.¹

In the third place, the Senate is a much smaller body than the House, containing only a little more than one-fifth as many members. Hence not only does it require a less elaborate organization, but it does not feel obliged to concentrate vast powers in the hands of a small group of managers in order to transact business with any degree of effectiveness. The party caucus, or "conference"—with its subsidiary steering committee, in the case of the majority caucus, and floor leader in the case of both majority and minority—exists, to be sure, but it is a much less powerful agency in the upper chamber than in the lower; and individual senators enjoy far greater freedom of action than do representatives. There is a committee on rules in the Senate as in the House, but it has none of the autocratic power to control business which the House committee exercises.²

While it can thus be seen that there are important, and even fundamental, differences in the organization of the two branches of Congress, there are, at the same time, numerous points of similarity. The same dual party system, for example, appears in both houses, giving color and character to the entire organization and to much of the procedure. Each house has its elaborate system of committees, not a few of them bearing the same names in the two branches. The most important Senate committees³ are the finance committee, which corresponds to the House committee on ways and means; the committee on foreign relations, to which are referred all treaties and all presidential nominations to posts in the diplomatic and consular services; the judiciary committee, to which are referred nominations to judgeships and to other positions connected with the federal courts; and the committee on interstate commerce, whose work relates to railroads, to telegraph, telephone, pipe-line and express companies, and to anti-trust legislation. Until rather recently, Senate committees were more numerous than House committees, and many were quite as useless as some of the latter; the committee on transportation routes to the

CHAP.
XXIIThe caucus
and com-
mittee on
rulesSimilari-
ties in
Senate and
House or-
ganizationSenate
committee
system

¹ An obvious exception is, of course, Vice-President Charles G. Dawes, who not only has waged a popular campaign for a revision of the Senate's rules but has been active in promoting certain legislation, particularly the McNary-Haugen farm relief bill and the McFadden branch-banking bill.

² G. R. Brown, *The Leadership of Congress*, Chap. XIV.

³ For a complete list of the thirty-four committees, and of committee assignments as they stood in 1926, see *Congressional Directory*, 69th Cong., 2nd Sess. (Jan., 1927), 189-203.

seaboard, for example, not having had a meeting for more than forty years. But this particular committee, along with upwards of two score others, was lopped off in April, 1921, when the Senate committee list underwent a pruning which reduced the total number from seventy-four to thirty-four.¹ Eight of the present number hold regular weekly meetings; the others meet at the call of the chairmen. In size, Senate committees run from three members up to seventeen in the case of the most important ones; and committee positions are divided between the two parties in about the same ratio as in the House. In contrast with members of the lower chamber, a majority of whom belong to only one committee, most senators must serve on four or five, which is an unfortunate circumstance. An obvious remedy would be to reduce the size of committees.

How com-
mittees are
made up

The method of making up committee lists in the Senate is substantially the same as that prevailing in the House. Each party caucus appoints a committee to distribute committee positions, including chairmanships, and when these committees complete their work it is approved by the caucuses and afterwards reported to the Senate for formal ratification. Rarely or never are any changes made after the lists reach the Senate.

At one time the Senate committee system was sharply criticized, even among senators themselves, on the ground that the chairmen or ranking members of a few important committees were able to exert a disproportionate influence upon legislation because of the rule which required them to be appointed to the conference committees that adjust most of the differences arising over measures passing the two houses in dissimilar form.² In the Sixty-fifth Congress, for example, one hundred and five conference committees were appointed, and five senators served on eighty-two of them. Senator Smoot served on thirty-three; Senator Warren, on twenty-three; Senator Nelson, on eleven; Senator Lodge, on nine; and Senator Penrose, on six.³ This situation was remedied to a degree in 1919, when a rule was adopted forbidding any senator to be chairman of more than one of the ten most important committees or a member of more than two such committees.⁴ Ex-

¹ *Searchlight on Congress*, V, 6-8 (Apr., 1921).

² *Ibid.*, IV, 9-10, 23-26 (June, 1919).

³ *Amer. Polit. Sci. Rev.*, XIV, 75-76 (Feb., 1920).

⁴ These committees are appropriations, agriculture, commerce, finance, foreign relations, interstate commerce, judiciary, military affairs, naval affairs, and post-offices and post-roads.

cept as modified by this regulation, the seniority rule holds sway in the Senate to practically the same extent as in the House.

The Senate, likewise, has its body of printed rules, and its parliamentary precedents; and it falls back upon Jefferson's "Manual" to a greater extent than does the House. The Senate rules are fewer than those of the House, and, being simpler also, are more easily mastered. The minor officers of the Senate correspond very closely to those of the House. The secretary is chosen in the same manner as the clerk of the House and performs similar duties, aided by a staff of upwards of thirty subordinates. There is, likewise, a sergeant-at-arms, who performs duties which at the other end of the Capitol are divided between the sergeant-at-arms and the doorkeeper. Lastly, the Senate has its own postmaster and its own chaplain.

CHAP.
XXIIRules and
miscel-
laneous
officers

REFERENCES

- A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), I, 355-360, 385-392; II, 131-134; III, 236-238, 369-371.
- D. S. Alexander, *History and Procedure of the House of Representatives* (Boston, 1916), Chaps. II-VII, X, XII.
- S. W. McCall, *The Business of Congress* (New York, 1911), Chaps. II, III, VIII, X.
- P. S. Reinsch, *American Legislatures and Legislative Methods* (New York, 1907), Chap. II.
- J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chap. xv.
- M. P. Follett, *The Speaker of the House of Representatives* (New York, 1904).
- H. B. Fuller, *The Speaker of the House* (Boston, 1909).
- G. R. Brown, *The Leadership of Congress* (Indianapolis, 1922), Chaps. II-XI.
- R. Luce, *Congress—an Explanation* (Cambridge, 1926), Chap. iv.
- P. D. Hasbrouck, *Party Government in the House of Representatives* (New York, 1927). Poorly organized, but rich in information.
- F. W. Mondell, "What's the Matter with Congress?" *Rev. of Revs.*, LXVIII, 61-72 (July, 1923).
- C. H. Rowell, "The Next Step in Washington," *World's Work*, XLIX, 155-163 (Dec., 1924), 311-318 (Jan., 1925).
- A. C. Hinds, "The Speaker of the House of Representatives," *Amer. Polit. Sci. Rev.*, III, 155-167 (May, 1909).
- J. G. Cannon, "Powers of the Speaker," *Century Magazine*, LXXVIII, 306-312 (June, 1909).
- S. W. McCall, *Life of Thomas B. Reed* (Boston, 1914).
- B. L. French, "Sub-Committees of Congress," *Amer. Polit. Sci. Rev.*, IX, 68-92 (Feb., 1915).
- L. G. McConachie, *Congressional Committees* (New York, 1898).
- R. Luce, *Legislative Procedure* (Boston, 1922).
- The Searchlight on Congress* (Washington). A monthly magazine of information.

CHAPTER XXIII

CONGRESS AT WORK

In the two preceding chapters, attention has been fixed on the composition of Congress and the organization of the two houses for the conduct of business, and presently we shall turn to a survey of congressional functions and powers. At the point we have now reached, however, it will be useful to bring together some further facts about the way in which the work of the legislative branch is carried on.

Physical
surround-
ings

The physical setting is not without interest. Both houses have their meeting place in the capitol building in Washington, a vast sandstone and marble structure situated on the brow of a low hill overlooking the city, the winding Potomac, and the heights of Virginia beyond.¹ The House of Representatives occupies a large rectangular hall in the south wing of the building; the Senate, moved in 1859 from the room now used by the Supreme Court, sits in a similar but smaller chamber in the north wing. As in legislative halls of Continental Europe, though not in England, the seats in each room are arranged in concentric rows, theater-fashion, facing the marble platform on which the presiding officer sits; and deep galleries provide space for many hundreds of spectators. Formerly, the hall of the House of Representatives was fitted with separate desks for the members; and the Senate chamber is still so equipped. But the growth of numbers in the lower branch made it necessary, after the reapportionment of 1911, to remove (in 1913) the individual desks, leaving only the seats, in close proximity, as in an ordinary theater or hall. Two tables are, however, conveniently placed for the use of committees whose reported bills are up for consideration—one on each side of the center aisle, near the aisle and well toward the front. At one of these the majority members of the reporting committee take their station; at the other, the minority members. So far as practicable, Republican members of the House sit together on one side of the

¹G. Brown, *History of the United States Capitol*, 2 vols. (Washington, 1900-03).

chamber and Democratic members on the other. The seats of individual representatives are assigned, at the beginning of a session, by lot; although in point of fact they are not occupied exclusively, and a member entering the hall when business is going on is likely to take any well-located seat that happens at the moment to be not in use. In the Senate, where there is never a general vacating of places, a newcomer claims for himself any seat that does not belong to another member and occupies it regularly. The physical equipment of the legislative branch further includes numerous committee rooms in the Capitol, an immense marble office-building for the members of each house, a library in the Capitol, and the separately housed Library of Congress, which is the largest library in the United States and the third largest in the world.

Each branch of Congress has certain functions which the other does not share, *e.g.*, the confirmation of appointments by the Senate and the preparation of impeachment proceedings by the House. But by far the greater part of the members' time is taken up with the consideration of bills and resolutions which become effective only after being adopted in identical form by both chambers; that is to say, the two houses spend most of their days working at the same sort of thing, though not, of course, on the same bills or resolutions simultaneously. Some of the measures on which they deliberate are designed to make or modify law, in the strict sense of the term; many others are intended, rather, to give directions to the officers of the government, and are therefore in essence only administrative orders.¹ But the same machinery is employed for both kinds of measures; the product is indiscriminately termed "statutes;" and so long as we are dealing with matters of procedure, the distinction of content has little importance except at one point, namely, in relation to the handling of finance bills.²

Time devoted mainly to considering and passing bills

How, then, does Congress "legislate?" To answer the question, we must briefly trace the successive steps normally taken between the time when a proposal is put into the form of a bill and the final publication of the measure as law.

The constitution requires that all bills for raising revenue shall originate in the House of Representatives. Every other kind of

How measures are introduced

¹ See pp. 459-461.

² The process of finance legislation necessarily falls within the scope of later chapters analyzing the government's financial powers (Chaps. XXVI-XXVII). Hence it is not treated in the present chapter. The omission must, however, be borne in mind as this chapter is read.

measure may make its first appearance in either house; indeed, through its right to amend revenue bills, the Senate may, in effect, originate them also.¹ In England and some other countries having a parliamentary, or cabinet, system of government, the ministers, who are themselves, of course, members of Parliament, introduce almost all of the important public bills.² The ordinary non-ministerial member, knowing that no measure which he introduces is likely, under the rules, to receive attention, rarely becomes the author or sponsor of a public bill. In our Congress there are no ministerial members. Bills and resolutions may be suggested by the president or the head of an executive department,³ who may even actively assist in framing them; but they have to be introduced by a member of one house or the other who, so far as getting a measure formally before Congress is concerned, has no more rights than any other member. The most important measures, such as tariff and currency bills, naturally emanate from the appropriate committees. But any member may at any time get a bill or resolution on the calendar of the house to which he belongs by simply depositing a copy of it, endorsed with his name, in a box on the clerk's table, or (in the case of a public bill) handing it to the presiding officer. If he wants assistance in drawing up his measure, he can get it from the legislative drafting service, of which there is a branch for each of the two houses. This service was established in 1918, in connection with a legislative reference service for which the first appropriation was made in 1915.⁴

Multiplicity
of bills

The mass of bills and resolutions presented every session is amazing. On an average, the House of Representatives receives fifteen thousand during the two-year period of a Congress, and the Senate a third as many, or more.⁵ This is not merely because of the ease with which measures can be introduced. Congressmen find it worth while to have their names in the papers (in their

¹ See p. 414.

² A public bill, it will be recalled, is a measure which is of general application, in distinction from a private, or special, bill, which applies only to particular, specified, persons or places.

³ See p. 275.

⁴ H. Putnam, "Legislative Reference for Congress," *Amer. Polit. Sci. Rev.*, IX, 542-549 (Aug., 1915).

⁵ If the several thousand private bills which nowadays are usually grouped in eight or ten omnibus pension bills be counted separately, the figures will, of course, be very much larger. Even counting in the omnibus bills only, 23,250 bills and 638 resolutions—a total of 23,888—were introduced in the Sixty-ninth Congress, organized in December, 1925. Eight omnibus pension bills in that Congress embodied 5,998 individually proffered measures, of which 5,533 were acted on favorably.

home districts, at all events) as the authors of bills. They are usually willing to introduce measures, however ill-considered and fantastic, at the request of persistent lobbyists or of interested groups of voters, especially among their constituents. Many bills wear "by request" labels, which mean that the members formally introducing them forswear all responsibility for them; and it is not even necessary to disclose the outside sources of such offerings. The introduction of great numbers of bills falls in, too, with American proneness to expect to cure every ill by piling up legislation. A very large proportion of the measures introduced—at least nine-tenths of them—are special bills appropriating public money for pensions, post-offices and other public buildings, and river and harbor improvements, usually in the state or district of the member introducing the bill; and the multiplicity of measures encumbering the clerk's tables is accounted for to a larger extent by the pressure brought to bear on congressmen to secure practical benefits of this kind for their constituents than by any other factor in the situation, or by all others combined. Special bills, even though the majority do not pass, have been the source of endless waste and jobbery; too often they are speeded on their way, while measures of country-wide interest have to fight for their lives. Of the large numbers of public bills introduced, the best one can say is that relatively few contain genuine possibilities of wise legislation, and that, fortunately, still fewer ever pass.¹

All bills introduced, after being numbered and recorded by the clerk, are referred to standing committees.² Special bills are turned over automatically to the committee designated in each case by the introducer. Public bills are sorted out and assigned, according to the rules governing the subject, by the clerk. Sometimes, however, a bill is of such a nature that it might be referred with almost equal appropriateness to any one of two or more committees, and in this case, as indeed in all cases of doubt, the speaker decides what shall be done.³ Sometimes a bill is divided

CHAP.
XXIII

Reference
to com-
mittee

¹ "The true source," says an experienced member of the House of Representatives, speaking of the general run of bills introduced, "may usually be found in some administrative official, or in some organization, or in some constituent with a grievance, an ambition, or a hope. Congress is not to any material extent an originating body." R. Luce, *Congress—an Explanation*, 3.

² The procedure up to this point is on the principle that all bills are created free and equal. All start on the same footing. Once the race for enactment has begun, however, the vast majority—as will appear—are found to have been left at the post.

³ To avoid confusion, the process will be described with reference to the House, and only important differences of procedure in the Senate will be noted.

among two or more committees. Occasionally, too, a bill, after being referred to one committee, is recalled and sent to a different one.¹ In any event, a bill, after being referred, is printed and distributed among the members of the House generally.

Each of the important standing committees has a commodious room in one of the splendid office buildings constructed for the members of the Senate and House, where a special library and ample stenographic service are provided. The two houses are commonly in session in the afternoon; hence committees regularly meet in the forenoon, and no committee of the House, save that on rules, may, without special permission, hold meetings while the House is itself in session. Many committees have little or nothing to do. But some receive scores, even hundreds, of bills every session, and accordingly find themselves crowded for time. To expedite matters, they create sub-committees (usually of five members) to which particular measures or classes of measures are assigned, or even particular sections of the same measure if it is one of exceptional importance, for example, a tariff or currency bill. Like the committee as a whole, these sub-committees contain representatives of both parties, but with the majority party always in control.

On receiving a bill, a committee has first to inform itself on the measure's contents and probable effects, and then to decide what to do with it. A prime requisite is, of course, information from which to judge whether legislation on the subject is needed, whether the present bill is calculated to meet the need, and what results and implications will follow if the bill is passed. Such information is, or may be, obtained in several ways. The members of the committee, availing themselves of the resources of the committee library, the Library of Congress (including the division of legislative reference), and departmental files, may study the measure at first hand and, as a group, decide what action to take. Or the bill (or certain parts of it) may be specially studied by a sub-committee. Again, information may be obtained from the findings and recommendations of special committees of investigation set up by Congress to prepare the way for legislation on a given subject.² Or data may be derived from in-

¹ Sections of presidential messages recommending legislation are similarly referred to the appropriate committees.

² Good examples are the Industrial Commission created in 1898, the Commission on Immigration in 1907, and the Industrial Relations Commission in 1913. As a rule, these commissions of inquiry consist of so many senators, an equal number of members of the House of Representatives, and several representatives of the general public appointed by the president.

vestigations made by executive officers of the government at the request of Congress. The principal mode, however, is the holding of hearings, at which almost any person having interests at stake, or having information or ideas to present, can appear, whether he is in favor of the bill or opposed to it. Frequently these hearings give the committee-room the semblance of a court chamber: paid attorneys argue for or against the bill under consideration, and interested persons give testimony, while the committee members listen and perhaps ask questions. On a great tariff bill the hearings may be drawn out through many weeks, the stenographic reports running into thousands of pages of print. Attendance of the general public is permitted, though not encouraged.

CHAP.
XXIII
Committee
hearings

Notwithstanding a large amount of publicity in the earlier stages of its deliberations, the committee eventually goes into executive session and reaches its conclusions in secret.¹ Any one of several results may follow. It may report the bill unchanged, which is, of course, tantamount to a recommendation of passage. Or it may strike out some sections, add others, or alter the phraseology, and report the measure in this amended form. Or it may frame a bill of its own and present it as an alternative. In all of these cases, the report is likely, although by no means certain, to lead to favorable action by the House, especially if the committee, or even the majority quota if the subject be of a partisan nature, has come to its decision by a unanimous vote. The committee has, however, one other possible course of action: it may make no report at all, or, in other words, may "pigeonhole" the bill; and this is the fate that befalls the greater part of the measures introduced.² The decision to make no report may come after, and as a result of, investigations and hearings. But, most frequently, a measure which does not strike the committee offhand as promising or important is simply ignored from the outset and has not the minutest chance

Possible
courses of
committee
action

¹ It is considered a breach of good faith for members, in the course of subsequent debate, to disclose what went on in committee, even though they be sorely tempted to do so; and the votes taken in committee are never made a matter of public record. In the executive sessions of committees, writes an experienced member, falls "the most interesting, important, and useful part of the work of a congressman, and the part of which the public knows nothing. Indeed the ignorance of the public about it is one of the causes of its usefulness. Behind closed doors nobody can talk to the galleries or the newspaper reporters. Buncombe is not worth while. Only sincerity counts." R. Luce, *Congress—an Explanation*, 12.

² Of all bills and resolutions introduced in the Sixty-sixth Congress, only 28 per cent got beyond the committee stage; in the Sixty-seventh Congress, 22 per cent; in the Sixty-eighth Congress, 36 per cent; and in the Sixty-ninth Congress, 45 per cent.

of ever occupying the time of the committee members, much less that of the House itself. Under a rule adopted in 1925 it is possible to "discharge" a committee (*i.e.*, recall a bill or resolution from it) which has had a bill thirty days if (a) a petition for such action has been signed by a majority of the House, (b) a motion to discharge has been seconded seven days later by a majority, and (c) after debate, a majority votes to discharge. But this is a difficult procedure, rarely brought into play successfully; and even when carried out, it has no effect beyond putting the measure "on its appropriate calendar" for future consideration.¹ For all practical purposes any bill can still be killed in its initial stage by simple failure of the committee having it in charge to report. Save for the rigorous sifting of bills which arises in this way, the House would be hopelessly swamped with work, and it would become necessary to place severe restrictions upon the number of measures that members may introduce.² Occasionally, a committee fails to report a meritorious bill for the reason simply that the majority members are personally prejudiced against it. But most measures that come to their end because of failure to report deserve no better fate.

The
calendars

A reported bill goes back to the clerk of the House and is placed on one of the three "calendars," which means that it is before the House for consideration as soon as it can be reached. If it is a revenue bill, a general appropriation bill, or a public bill directly or indirectly appropriating money or property, it goes on the Calendar of the Whole House on the State of the Union, commonly known as the Union Calendar. If it is a public bill not directly or indirectly appropriating money or property, it goes on the House Calendar. If it is a private bill, it finds a place on the Calendar of the Committee of the Whole House, sometimes called the Private Calendar.³ Theoretically, bills are called up in the order in which they appear on these calendars or lists, but in

¹ P. D. Hasbrouck, *Party Government in the House of Representatives*, Chap. VIII. Occasionally a committee will follow the plan, not of failing to report at all, but of reporting late with the expectation that the measure will be caught in either the House or the Senate in the final jam.

² The system has its obvious advantages and disadvantages. It affords an easy method for presenting matters of real importance, and it saves time in the introduction of business, but it permits the bringing forward of all sorts of "half-baked measures and sensational bills, which are sometimes published widespread throughout the country, and excite unnecessary alarm among those who take them seriously and who would be especially affected by the proposed legislation." S. W. McCall, *The Business of Congress*, 46.

³ These calendars were established in their present form in 1880, although the first and third existed for some time before that date.

practice they are frequently, indeed usually, considered out of their turn.

CHAP.
XXIII

For it must not be supposed that all bills that find their way to one of the calendars are actually taken up, debated, and voted on. With some two score standing committees—of which at least half are very active—reporting bills, the calendars soon grow congested, and only a small proportion of the measures listed can be given attention. The problem is to sift out the bills most deserving of consideration, and especially to ensure opportunity for the proper disposal of great and essential measures, such as the general appropriation bill of the year. This end has been attained through the development of an order of business which is regular, yet also flexible. The normal order of business for a day runs, according to the rules, as follows: (1) the speaker calls the House to order; (2) the chaplain offers prayer; (3) the journal of the previous day's proceedings is read and approved; (4) reference of public bills is corrected; (5) business "on the speaker's table," *i.e.*, presidential messages, bills with Senate amendments, and other matters which await the speaker's presentation to the House, is disposed of; (6) "unfinished" business, which is the business on which the House was engaged at the time of adjournment, is completed; (7) the "morning hour,"—which, in point of fact, continues indefinitely until a motion brings it to an end—is devoted to the consideration of general bills called up from one of the calendars by committees which have reported favorably on them; (8) if time allows, the House goes into committee of the whole to discuss revenue or appropriation bills on the Union Calendar, or, if none such are pending, other public bills listed on the House Calendar.

Order of
business in
the House

This sequence is not, however, to be regarded as inflexible. On the contrary, it is subject to interruption at almost any stage, and in a great variety of ways. In the first place, certain days are set aside for the consideration of particular kinds of measures, *e.g.*, the second and fourth Mondays of each month for business relating to the District of Columbia, and every Friday for bills on the Private Calendar. Again, at any time after the journal is read, it is in order, by direction of the appropriate committees, to move that the House go into the Committee of the Whole House on the State of the Union to consider revenue or general appropriation bills. Certain committees, too, have the privilege of reporting at any time, *e.g.*, those on ways and means, appropriations,

Departures
from the
regular
order

elections, and rules, and—what is more important—securing immediate consideration for their reports. Bills introduced at the instigation of the president or of a department head, or for any other reason considered as Administration measures, are often given right of way. Finally, by a two-thirds vote, the House can suspend the rules and depart as widely as it likes from the regular procedure, even to the extent of passing a measure through all stages at a single vote.¹ Under these circumstances the process of legislation in the House has been aptly likened to the running of trains on a single-track railroad. "The freight gives way to a local passenger train, which sidetracks for an express, which in turn side-tracks for the limited, while all usually keep out of the way of a relief train. Meanwhile, when a train having the right of way passes, the delayed ones begin to move until again obliged to side-track."² The order of business—which represents a long development from simple days when there was time enough for the handling of all business that was offered—is useful as a general program or guide; but, in order to permit vital matters to be got at promptly and disposed of expeditiously, there must be recognized, and not very difficult, ways by which the regular order can be interrupted or suspended.

Mention has been made of the Committee of the Whole; and inasmuch as the sessions of this committee occupy the greater part of the time of the House, something more ought to be said about it. In reality, there are, as has appeared, two Committees of the Whole: (1) the Committee of the Whole House, which considers private bills, and (2) the more important Committee of the Whole House on the State of the Union, which handles public bills for raising revenue and for appropriating money or property. Both are, of course, simply the House of Representatives sitting in a different guise. The House, on motion of a member, votes to resolve itself into the Committee of the Whole for the consideration of private bills or of a designated public bill; the speaker yields the chair to a special chairman whom he designates; one hundred members constitute a quorum, instead of the majority required

¹ Ordinarily, this two-thirds rule operates as a safeguard for the rights of the minority. But it loses this character when, as in the Congress elected in 1920 (the Sixty-seventh), one party has so great a majority that the rules can be suspended by vote of the members of that one party alone. This situation, of course, does not arise very often.

² D. S. Alexander, *History and Procedure of the House of Representatives*, 222.

when the House is in regular session; ¹ any measure, or matter, that has been referred to the committee may be taken up; debate proceeds, very informally, under a rule allowing only five minutes to each speaker at a time, unless with unanimous consent; there are no roll-calls, and divisions are taken only by a rising vote or by tellers; and when the consideration of a measure is completed the committee votes to "rise," the speaker resumes the chair, the mace (the symbol of the speaker's authority) is restored to its place on the marble pedestal at the right of the chair, and the chairman of the committee reports the action taken, with any amendments which may have been recommended. The House must, of course, act upon the committee's report in order to give it effect.

This device, whose origins are traceable to the Stuart period of English history, has proved exceedingly useful. It enables all finance bills to be considered in committee, yet under such circumstances that every member of the House can have a voice in the proceedings. It permits great numbers of amendments to be presented, explained, and disposed of expeditiously. It prompts rapid-fire, critical debate which, as a rule, shows the House at its best. And the absence of recorded yeas and nays enables members to speak their sentiments without check or restraint such as published votes sometimes impose.²

Under a rule which in substance dates from the first Congress, every bill or joint resolution, in order to be passed, must have three readings. The first reading is by title only. Speaking strictly, it is no longer a "reading" at all, for the requirement is deemed to be met by printing the title in the *Record and Journal*. Then the bill goes to committee and, if reported back, is placed upon the calendar for a second reading, at a date agreed upon between the committee and the speaker and majority floor leader. The second reading—which takes place in Committee of the Whole, or for bills not there considered, in the House itself—is an actual reading in full, with opportunity for the offering of amendments; and this is followed by a vote on the question, "Shall the bill be engrossed

The three
readings

¹ The difficulty of holding a quorum, and the enormous waste of time consumed by roll-calls (estimated at a month to six weeks out of every two-year term) has led to the suggestion that fifty be made a quorum. It is of interest to note that even in the regular sittings of the British House of Commons forty is a quorum. A. L. Lowell, *The Government of England*, I, 250.

² D. S. Alexander, *History and Procedure of the House of Representatives*, Chap. XIII.

and read a third time?"¹ If this stage is passed successfully, the third reading takes place, by title only unless a member demands a reading in full. Then—after engrossment—and only then, comes the vote on the measure's final passage. If the result is favorable, the bill or resolution is ready to be sent to the Senate.

As a rule, debate takes place only on the question of ordering a bill to a third reading, although, if not cut off by the "previous question," it may be renewed on the question of final passage. When a measure reaches the stage at which it can be discussed on the floor, the chairman (or other designated representative) of the committee which has reported it favorably speaks in its behalf, being followed by a minority member of the committee if, as is usually the case, the report has not been unanimous. Other members of the committee speak alternately for and against the bill, and finally members of the House who do not belong to the committee are recognized—provided any time remains. A rule dating from 1841 forbids a member to speak for more than an hour, except with unanimous consent. Even so, debate would tend to be interminable, but for certain devices by which it can be brought to a close, chiefly (a) advance agreements—now very common—on the length of time it shall be allowed to run and (b) a practice, borrowed in modified form from the British House of Commons, known as the "previous question." At any stage of the discussion, any member of the House may "move the previous question;" and if the motion carries, a quorum being present, debate is ended and a vote is forthwith taken on the question which has been under consideration, although if there has as yet been no debate at all, the speaker is required to allow a debate lasting forty minutes.²

Formerly, opponents of pending bills employed all manner of expedients to kill time and prevent action. Dilatory motions were made; unnecessary roll-calls were forced; efforts were put forth to stop proceedings by leaving the House without a quorum; time-consuming amendments were offered; and as a result a great part of the time of the House was wasted. Rulings of strong speakers, backed up by specially devised House regulations, have consider-

¹ The reading of bills by a reading clerk is another serious waste of precious time. The practice was long ago abandoned in the British Parliament and has been discontinued in the most progressive of our state legislatures. Congress holds tenaciously to it, "with the result of throwing away nearly if not quite a month of every term in mere clerical enunciation."

² For a full discussion of the use and effects of closure in the House, see L. Rogers, *The American Senate*, 117-161.

ably reduced the effects of these forms of obstruction. One such regulation, as we have seen, growing out of an historic action of Speaker Reed in 1890, stipulates that "no dilatory motion shall be entertained by the speaker."¹ Plenty of ways of slowing up business, however, remain—many of them relics of a procedure shaped in days when tasks were relatively simple, but now archaic and outgrown.

Upon conclusion of the consideration of a bill or resolution, or an amendment thereto, a vote is taken. In regular sittings of the House four, and in committee of the whole three, modes of voting are used. The first, and most common, is a division by simple sound of voices, *i.e.*, a *viva voce* vote. If any member is dissatisfied with the announced result of this, he may demand a rising vote; whereupon the supporters of each side of the question are counted. Again, if one-fifth of a quorum demands it, a vote is taken by tellers: a teller is designated for each side; the two take their places in front of the speaker's desk; the members in favor of the measure pass between them and are counted, and then those opposed; and the result is declared by the tellers and announced by the chair. Or, finally, if one-fifth of those present demand it, the yeas and nays are ordered: the clerk calls the names of the members, who respond with "yea" or "nay;" these individual votes are recorded; and the result is duly announced. The yeas and nays may be demanded before any of the other methods has been employed, and, if ordered, are taken forthwith.² But it must be noted that this form of voting is used only in regular sittings of the House, never in Committee of the Whole. Attempt was formerly made to compel all members present to vote, but this has been given up as impracticable.³

Methods
of voting

After a bill is passed in the House, it is certified by the clerk and carried by him to the Senate chamber, where it is received by the presiding officer and referred to the appropriate committee. Space forbids us to describe in detail the process by which the Senate legislates. But it is happily unnecessary to do so because,

Procedure
in the
Senate

¹ See p. 379.

² When the question is one of passing a measure over a presidential veto, the constitution requires the yeas and nays to be taken and recorded. Art. I, § 7, cl. 2. A great deal of valuable time would be saved if an electrical-voting device—such as is employed successfully in the legislatures of Wisconsin, Iowa, and Texas—were installed for use on all ordinary occasions. A single roll-call in the House of Representatives consumes about forty-five minutes.

³ The stages in the enactment of a bill by the House are set forth officially in the *House Manual and Digest*, 68th Cong., 2nd Sess. (1925), 441-444.

speaking broadly, the course of procedure is not very different from that already outlined in connection with the House. A bill—whether originating in the Senate itself or sent over from the other end of the Capitol—is, as has been said, referred to one of the standing committees; if regarded favorably, it is reported; if reported, it is placed on a calendar, from which it may be called up out of its turn; three readings must be passed, the second one, at which amendments are offered, being the critical test; members are put on record by the yeas and nays under the same conditions as in the lower house; and as a result the bill may be adopted as it stands, or adopted with amendments, or defeated.

There are, however, some important differences between Senate and House procedure. For one thing, not only revenue bills and bills involving a charge upon the treasury, but all bills, are considered in the Senate in Committee of the Whole, yet without a change of presiding officers (for the reason, presumably, that the vice-president is not a member of the body in any case). In the second place, there is no privileged business in the Senate, so that the order of the calendar is followed automatically unless by unanimous consent or a majority vote otherwise.¹ More important still is the relative absence of restraint upon debate. There are no restrictions upon the length of speeches, except such as are occasionally agreed to in respect to a particular measure, nor any upon their number, except that a senator may not, without consent, speak more than twice on the same subject in a single day; and, save for the rather frequent use of a "unanimous consent" procedure and the very infrequent use of a closure rule adopted in 1917,² debate proceeds entirely without limitation. This was not always true. In 1789 the Senate, like the House, started off employing the familiar "previous question"³ as a means of checking discussion. But the device was found relatively useless, and in 1806 it was dropped from the code of rules. Since that time greater freedom of debate has prevailed in the Senate than in any other important legislative body in the world. The comparatively small number of members has made this possible; and it cannot be denied that such liberty has some very decided advantages. The knowledge that debate will not be cut off as long as any member has anything to say stimulates discussion and encourages the consideration of

¹ In practice, appropriation bills enjoy a certain priority.

² Both will be explained below.

³ See p. 406 above.

measures from all angles. Minorities have opportunity to make themselves heard as they rarely or never can in the House. And freedom of full and indefinitely prolonged discussion in the Senate operates as a wholesome check—particularly in view of the separation of powers upon which our system of government is based—upon the executive, and also upon tendencies to party autocracy.¹

CHAP.
XXIII

Unfortunately, liberty is sometimes abused, in the United States Senate as elsewhere. Such abuse, in the Senate, takes various forms. The commonest is simple boresome garrulity—wasting time by sheer talkativeness. A clause from Jefferson's Manual still appears in the Senate rules to this effect: "No one is to speak impertinently, or beside the question, superfluously or tediously."² But empty seats on the floor and yawning spectators in the galleries bear eloquent testimony to the fact that this rule—the latter part of it, at all events—is much of the time more honored in the breach than in the observance. More important, however, than this is the deliberate use—often, though not necessarily in all cases, *misuse*—of unrestricted freedom of debate with a view, not to throwing light on the subject under discussion or to converting the opposition, but to delaying and perhaps preventing action. This practice is, in general, known as filibustering; and while it was not unfamiliar in earlier times, it has been brought into play most spectacularly and successfully in the last forty years, and especially since about 1910. A filibuster may be organized and conducted by a group or *bloc* of members, or it may be carried on by a member single-handedly; and it may have as its object to defeat a measure by "talking it to death," to compel amendments to be added, or to force the majority elements to acquiesce in the passage of some other, and perhaps quite unrelated measure, in which the filibusterers are interested.³ Naturally, a filibuster will have the largest chances of success if launched near the end of a session, particularly the biennial short session, the date of whose termina-

Obstruction
in the
Senate: fili-
bustering

¹ "The Senate is the only American institution so organized and articulated as to exert any supervision over the executive, and this function would be impossible were the rules to provide for closure." L. Rogers, *The American Senate*, VIII. The thesis here laid down is argued forcefully, and on the whole convincingly, throughout Professor Rogers' interesting book.

² *Rules and Manual of the United States Senate*, § xvii.

³ Sometimes, too, a Senate filibuster is employed to put pressure on the House of Representatives; bills in which the House is interested, or which are vital to the carrying on of the government, are held up until the House consents to pass a measure which the Senate filibusterers want to see converted into law. Senator Heflin, of Alabama, engaged in such a filibuster near the end of the last session of the Sixty-seventh Congress (Feb.-March, 1923).

tion is fixed and irrevocable. In fact, the records show that almost all famous filibusters have taken place in the last hectic days of short sessions; conversely, they show that such occurrences have come to be the rule rather than the exception at such junctures.¹ Many historic filibusters have proved severe endurance tests—for the speakers (especially for one who is making a single-handed fight) if not for the hearers, who, in point of fact, can often be counted on the fingers of one hand. Senator Faulkner spoke continuously for thirteen hours on the force bill of 1890, Senator Allen for fourteen hours on the silver purchase bill of 1893, and Senator LaFollette surpassed all records, in 1908, with an eighteen-hour speech on the Vreeland-Aldrich emergency currency bill, in the course of which he sat part of the time on the arm of his chair and at intervals refreshed himself by drinking a mixture of egg and milk.

The armed
merchant-
ships fili-
buster

The first truly spectacular and notably successful filibuster was that of 1890 against Senator Lodge's force bill; and although it had already been suggested a number of times that provision for the previous question be reinstated in the rules, it is from this point that the later movement for adoption of some form of closure really dates. A closure rule was, indeed, brought in at this time, though defeated by artful use of the very device which it proposed to curb. As filibusters grew more common and their objectionable features more apparent, other efforts to check them were made, but entirely without success until 1917. In that year a small band of filibustering senators defeated a bill authorizing the arming of American merchant-ships, at a time when our difficulties with Germany were nearing a crisis, thereby creating a situation declared by President Wilson to be "unparalleled in the history of the country, perhaps in the history of any modern government." "In the immediate presence of a crisis," . . . the president went on to say, "the Congress has been unable to act either to safeguard the country or to vindicate the elementary rights of its citizens. More than five hundred of the five hundred and thirty-one members of the two houses were ready and anxious to act; the House of Representatives had acted, by an overwhelming majority; but the Senate was unable to act because a little group of eleven senators had determined that it should not. . . . The Senate of the

¹ In behalf of the Norris amendment and other proposals for doing away with the short session it is plausibly argued that the change would have the indirect advantage of greatly reducing filibustering. See p. 357.

United States is the only legislative body in the world which cannot act when its majority is ready for action. A little group of willful men, representing no opinion but their own, have rendered the great government of the United States helpless and contemptible. . . The only remedy is that the rules of the Senate be so altered that it can act."¹

CHAP.
XXIII

Convoked in special session immediately after this occurrence,² the Senate adopted by the decisive vote of 76 to 3 a rule under which it is now possible, although not easy, to bring debate to an end. The process is as follows.³ First, a petition to close the debate must be signed by one-sixth (sixteen) of the senators. On the second calendar day after this petition has been filed, the roll of senators is called on the question: "Is it the sense of the Senate that the debate shall be brought to a close?" If there is a two-thirds vote in the affirmative, the measure before the Senate becomes the "unfinished business" until disposed of, to the exclusion of all other business; and, thereafter, no senator is permitted to speak for more than one hour altogether on the measure itself, or on its amendments, or on motions relating thereto. Furthermore, no amendments may be presented, except by unanimous consent; no dilatory motions or amendments are in order; and all points of order are decided by the chair without debate.

Adoption
of closure
(1917)

This is closure in rather a mild form; the two-day delay provided for gives the opposition a chance to mobilize its forces, and two-thirds is a high figure for the supporters of the move to attain. In a period of almost ten years the device was successfully invoked only twice, *i.e.*, in the debates on the Versailles treaty in 1919 and on adherence to the World Court in 1926. In the short session ending March 4, 1927, however, five petitions went to a vote, and two of them prevailed, closure accordingly being applied in the debates on the McFadden branch-banking bill and a bill establishing bureaus of customs and prohibition in the Treasury Department and placing prohibition agents in the classified civil service. It is possibly true, as some people have assumed, that closure is on the road to becoming a commonplace of senatorial routine. But that the present form of it is not generally expected to prove very effective is evidenced by the demand heard in various quarters for new

Workings
of closure
in its
present
form

¹ *Amer. Yr. Book* (1917), 5.

² The filibuster immediately preceded the close of the Sixty-fourth Congress on March 4, 1917.

³ *Senate Manual*, 25-26, Rule XXII; *Amer. Polit. Sci. Rev.*, XI, 372 (May, 1917).

regulations on the subject. In his inaugural address, in 1925, Vice-President Dawes denounced the present power of Senate minorities to stop legislation by obstruction and called for a revision of the rules to bring it to an end.¹ He has kept up a vigorous campaign on the subject, which is seconded by the efforts of many other persons and organizations, even though with no present prospect of early success.² In addition to the objection on general principles that minorities ought not to be able to hold up the Senate's work, there is special reprobation of filibusters which frustrate the passage of appropriation bills and those which are aimed merely at compelling the Senate to tack on to a bill some more or less irrelevant provision in which the filibusterers happen to be interested. An illustration of the former is the colorful filibuster of February-March, 1927, which caused the failure of a deficiency bill and a bill carrying appropriations for pensions, with much resulting embarrassment. A notorious instance of the latter is a filibuster carried on in 1903 by Senator Tillman because a deficiency appropriation bill omitted an item paying his state a war claim. In this instance the senator took the floor with a copy of *Childe Harold* and calmly announced to his fellow-members that unless they agreed to replace the item he would read this and other poems until the session ended. Wearying of ballads after a time, the senators consented to restore the item.

Before turning from the subject, brief mention may be made of certain main arguments employed by those who would have the Senate go no farther than it has gone in placing restrictions on debate. The first is that by far the greater portion of the measures that have been killed by filibuster were not wanted by the country and were never revived, a good illustration being the ship subsidy bill sponsored by President Harding in 1922. A second is that the Senate, on the present basis, is able to get through with a very satisfactory proportion of the business presented to it, as is evidenced by the fact that in the last five congresses the Senate passed one hundred and eighty-two more bills and resolutions than the House, even though the latter has full provision for closure and is rarely the scene of a filibuster. A third consideration is that the present oft-used device of "unanimous consent," by which the members unanimously agree in advance to limit speeches on a

¹ *Cong. Record*, 69th Cong., Spec. Sess. of Senate, Vol. LXVII, pp. 1-2.

² For a drastic rule on the subject proposed by Senator Underwood in 1925, see L. Rogers, *The American Senate*, 181-182,

given measure after a certain day and to take a vote at a specified hour, serves all necessary purposes, being in truth itself a species of closure. If a fourth were to be added, it would perhaps be that, for the most part, the attitude of individual senators is determined by their personal interests (a member whose bill has been defeated usually being, for a time, quite keen about abolishing filibustering), and is often totally different in one set of circumstances from what it was when conditions were reversed.¹

A bill which passes both branches of Congress in identical form is sent to the president and becomes law if it receives his signature. The Senate may, however, amend a House bill, and the House may amend a Senate bill; and unless the first body forthwith accepts all of the amendments added by the second one—which will practically never happen in the case of an important measure—some means must be found of smoothing out the differences. No bill can become law unless every part and feature of it has been concurred in at both ends of the Capitol. The means regularly employed to bring the houses into agreement is the appointment of a conference committee; and statistics show that, on the average, one-tenth of all the bills and resolutions that pass through Congress—including almost all of the weightier ones, *e.g.*, on taxation, commerce, immigration, etc.—are referred to such a committee. Sometimes the initiative is taken by the house in which the measure originates, sometimes by the house making the first amendment to the measure after receiving it from the originating house, the latter, in this case, being asked for a conference before it has had any opportunity either to accept the amendments or to reject them. In any event, one house invites the other into conference, the committee for the purpose being composed usually of three, but occasionally, for very important bills, of five, seven, or even nine, “managers” appointed from each house by the presiding officer thereof, and almost invariably including in each case the chairman, the next ranking majority member, and the ranking minority member of the committee having the bill in charge. The House frequently instructs its conferees; the Senate never does so, and is strongly opposed to the practice. In any case, the conference is always a “free” conference; that is to say, the managers are at liberty to

CHAP.
XXIII

Disagree-
ments be-
tween the
houses

¹ On the general subject of closure in the Senate see L. Rogers, *The American Senate*, 161-190, and R. Luce, *Legislative Procedure*, 283-296; on closure in the short session of the Sixty-ninth Congress, *Amer. Polit. Sci. Rev.*, XXI, 300-308 (May, 1927). Cf. A. W. Dunn, “The Filibuster Defended,” *Rev. of Revs.*, LXXII, 634-638 (Dec., 1925), and article by Senator G. W. Norris in *New York Times*, March 13, 1927, § 8, p. 1.

discuss all the issues in disagreement between the two houses and to use their judgment in settling them.¹ The meetings are held in the room of the Senate committee having jurisdiction of the bill.

The task before a conference committee may be easy or difficult. The house which last considered the measure in hand may have introduced but few and not particularly contentious amendments; and by simple process of give and take the conferees may speedily come to a report which the two houses can accept. On the other hand, scores, and even hundreds, of alterations may have been made, and indeed the whole of the bill following the enacting clause may have been stricken out in favor of a new bill. Even in revenue legislation—despite the constitutional provision that all bills for raising revenue shall originate in the House—the Senate sometimes goes this far, as for example, in considering the tax revision bill passed in 1921, when it wrote an entirely new law, in the form of eight hundred and thirty-three amendments to the House bill.² Sometimes a conference committee's work is soon over; sometimes weeks of hard labor are required. If no agreement can be reached, the bill fails—unless another joint committee is appointed and is more successful. But with rare exception a consensus is arrived at; and with almost equally rare exception the reported bill is accepted by both houses. There is no rule in either house requiring it, but it is a fixed principle of prevailing parliamentary law that a measure as it comes from conference is to be accepted or rejected *in toto*, *i.e.*, not piecemeal, and with no amendments. Ordinarily the house which has offered the amendments recedes less than the one which originated the bill. Thus in the case of the tax revision measure mentioned above, the Senate gave up only seven of its proposals, while the House entirely accepted seven hundred and sixty of them and accepted with qualifications sixty-six more.

In Congress, as in the state legislatures, the conference committee is an exceedingly useful device. It is more necessary than in European countries (although it is by no means unknown there) because, in the first place, our national and state legislatures—

¹ This in contrast with the "simple" conference, formerly employed rather extensively in the British Parliament, in which the representatives of one house merely state the position of their house to the representatives of the other one, with no discussion or conference decision following.

² Other instances come to mind. In 1883 the Senate struck out everything after the enacting clause in the tariff bill of that year and wrote its own measure, which the House was obliged to accept. It added eight hundred and forty-seven amendments to the Payne-Aldrich tariff bill of 1909, dictated the schedules of the emergency tariff act of 1921, and largely rewrote the permanent tariff act of 1922.

unlike practically all European parliaments today—are organized on the plan of strict equality, legislatively, of the two houses, so that no bill or resolution can prevail unless definitely agreed to by both; and in the second place, because whereas in cabinet-governed countries the ministers, who in a sense constitute a continuous conference committee of the two houses, are able to co-ordinate the houses' actions, our system of balanced government tends to leave the legislative houses isolated and devoid of coördinating machinery except such as the houses themselves set up. The machinery which they employ is, of course, the conference committee; and it serves very effectively both to settle differences and to expedite procedure. Some questionable features, however, appear. Almost without exception, conference committees work in secret. Doubtless it would be difficult for them to make headway if they followed a different course. Nevertheless, in view of the power which they wield, strong objection can be, and is, raised. For while the committee is supposed to deal only with actual differences between the houses and to stay well within the bounds set by the extreme positions which the houses have taken, it often works into the measure, as reported, many features of its own, even going so far as to rewrite whole sections with the sole purpose of incorporating the views which the majority members happen to hold. Conference committee reports are likely to reach the houses near the close of a session,¹ and, as has been said, are very likely to be adopted. There may be little time for critical scrutiny or debate; anything that the committee reports has a strong presumption in its favor; failure to act might seriously interfere with the operation of the government. In practice, this often means the adoption of important provisions, more or less surreptitiously added, without consideration by either house—in other words, legislation nominally by Congress but actually by conference committee.²

¹ Under the rules, they are highly privileged, especially in the House of Representatives, where they may be presented at any time when the journal is not being read or a vote taken.

² L. Rogers, "Conference Committee Legislation," *No. Amer. Rev.*, CCV, 300-307 (Mar., 1922); A. C. McCown, *The Congressional Conference Committee* (New York, 1927), especially Chap. 1. It should be added that in 1917 the Senate adopted a rule providing that conferees should not insert in their report matter not committed to them by either house, nor strike from the bill matter agreed to by both houses; and in 1920 the House adopted a similar rule in respect to conference committees on appropriation bills. As is evidenced by recurring protests, however, both practices persist to some extent. Senator Norris's fight against the Muscle Shoals bill of 1925 affords a good illustration.

CHAP.
XXIIIFinal
stages

When a bill has been passed in identical form by both houses, it is "enrolled," *i.e.*, written or printed on parchment, and is thereupon signed by the presiding officers and sent to the president. If it is approved, or if it becomes law without presidential action, it is transmitted to the Department of State, to be deposited in the archives, and also to be duly published.¹ If it is vetoed it goes back to the house in which it originated and becomes law only if, upon reconsideration, it is passed in both houses by a two-thirds majority.²

Publicity
of pro-
ceedings

On the ground that part of its work was of such a nature as to require secrecy, *e.g.*, the consideration of treaties, the Senate at first sat exclusively behind closed doors; and even the House of Representatives occasionally barred the public from its deliberations. Strong objection, however, arose, and in 1793 the Senate adopted the wiser plan of opening its doors whenever engaged in ordinary legislative business and closing them only during "executive" sessions. The last secret session of the House was held not long afterwards, in 1811. In executive session the Senate has to do chiefly with treaties and nominations to public office submitted by the president—matters on which it acts, not strictly as a branch of the legislature, but as an executive council. Privacy is, therefore, quite logical and defensible. In point of fact, the public soon comes to know what is done, and even much of what is said; for although the officers are sworn to secrecy and the members are presumably bound in honor not to give out information, enterprising press correspondents usually contrive to inform themselves rather fully and accurately on what has taken place.³

Published
records:

The constitution requires both houses to keep a journal and to publish it "from time to time."⁴ The journals are, however, bare records of bills introduced, reports presented, and votes taken—that is, minutes of official actions, not records of debates. For a long time, debates in the House of Representatives were not reported, except in a haphazard way in some of the better newspapers, and Senate debates were practically not reported at all,

¹ G. Hunt, *The Department of State*, Chap. xi.

² See p. 262.

³ On this account, as well as on other grounds, Senator Dill introduced a resolution in February, 1925, providing for public executive sessions unless two-thirds of the members should order otherwise. See *Searchlight on Congress*, X, 11-13 (Feb., 1925); G. W. Norris, "Secrecy in the Senate," *Nation*, CXXII, 498-499 (May 5, 1926).

⁴ Art. I, § 5, cl. 3.

although accounts of what went on in that body were frequently printed, as were isolated speeches.¹ In 1833, however, the *Congressional Globe*, giving the debates verbatim, was started as a private venture; and in 1873 the present *Congressional Record*, prepared by officers of Congress and printed by the government, was established. The *Record*, published daily during sessions, purports to give an exact stenographic account of everything that takes place on the floor of the two houses—save, of course, during executive sessions of the Senate. This it does not actually do, because members sometimes edit their remarks in such a way as to make important changes in them, and because, in the case of the House, speeches are frequently printed, under special leave, which were never delivered by word of mouth at all. The Senate does not permit the latter practice, but it is quite as liberal as the House in allowing members to get into the *Record* magazine articles, documents, and even large portions of books, which have not been read in debate. In many cases these extraneous materials, especially the House speeches, are designed to be sent out in quantities, under the government frank, for use in the member's campaign for reelection. This is one of the reasons why the *Congressional Record* has become so voluminous as to be practically useless to non-members, except, of course, for historical or research purposes. Anywhere from twelve to sixteen thousand of its generous double-columned pages are filled every biennium—enough matter, such as it is, to make up a library of a hundred ordinary volumes—and at a present cost to the treasury of forty-eight dollars a page!

CHAP.
XXIII1. Proceed-
ings

All measures, when the process of enactment is completed, are transmitted to the Department of State and by it printed in the form of "slip-laws," which are obtainable on application. At the close of each congressional session the texts are collected, indexed, and published under the title of *Statutes of the United States*—commonly referred to as "pamphlet," or "session," laws. Finally, at the close of each Congress these session laws are consolidated into permanent volumes entitled *Statutes at Large of the United States* and containing all acts and joint resolutions, public and

2. Laws

¹ The collections entitled *Debates and Proceedings in Congress, 1789-1824* (42 vols., 1834-1856)—commonly cited as *Annals of Congress*—and *Register of Debates in Congress* (14 vols., 1825-1837) bring together these fugitive materials from newspaper, pamphlet, and other sources. There is, of course, nothing official about these publications, and the reports on which they are based are very incomplete and sometimes highly partisan.

private, and all concurrent resolutions, treaties, and presidential proclamations of the two-year period.¹

Congress
not hope-
lessly
inefficient

As a mechanism of legislation, Congress undeniably merits some of the criticism heaped upon it by political reformers, press, and foreign observers. It is far from perfection—far from even the capacity and efficiency that might conceivably be attained. The haphazard and largely irresponsible selection of measures to be taken up, the minority-government possibilities inherent in the caucus, the vice of filibustering, undue adherence to the seniority rule in Senate and House committees, too frequent subordination of national to partisan and local interests and considerations—these and many other shortcomings suggest themselves to every reader of the preceding pages. Nevertheless, it is to be borne in mind that much of the complaint which one hears springs from the disappointment or exasperation of people whose pet projects have been defeated or whose ideas have not proved to be those of the congressional majority. While one group rails at Congress because of legislation enacted in the interest of the farmers, a “farm bloc” insists that not enough has been done in this direction. The “wets” criticize a statute for the enforcement of the Eighteenth Amendment; the “drys” complain that the law is not sufficiently stringent. Do what it will, or do nothing at all, Congress is certain to encounter a chorus of disapproval. The fact is that, notwithstanding shocking wastage of time, a vast amount of careful and intelligent work goes on on Capitol Hill, especially in the great committees, and that the houses somehow succeed in placing on the statute book numerous measures, having back of them a great volume of favorable public sentiment. A stream does not rise higher than its source; by and large, Congress is no better, and no worse, than the people from which it springs.

Handicaps

It must be conceded that the business of lawmaking is carried on under serious handicaps, for some of which Congress is itself in no wise responsible. The very size of the country, and consequently of the membership of at least the lower house, is a limiting condition. The federal character of the government, entailing intricate problems of division of power, creates difficulties. For other

¹The most convenient compilation of statutes in force at a relatively recent date, classified by subjects, is *U. S. Compiled Statutes* (1918) and *Supplement* (1923), issued by the West Publishing Co., St. Paul, Minn. Cf. *Code of Laws of the United States . . . in force . . . to December 6, 1926* (Washington, 1926).

drawbacks the houses are somewhat to blame but not entirely. Lack of leadership, sustained and dependable, yet free from dictatorial abuses, is enervating and disheartening. The magnitude of the annual grist of business is an appalling obstacle which neither the new budget system nor any other supposed timesaving device has appreciably lessened.

CHAP.
XXIII

Not that Congress ever fails to pass measures in bewildering number and variety. Even before the World War, a single Congress (the Fifty-ninth) was able to turn out about seven hundred public laws and over six thousand additional measures of a special, or private, nature; and the Sixty-seventh Congress, expiring March 4, 1923, was widely denounced as a "Do-Nothing Congress," notwithstanding that its output of public laws alone numbered nine hundred and thirty-one. The drawback of voluminous business consists in the hasty and otherwise inadequate consideration often given important measures, and the confusing of issues, and general cluttering up of procedure, by masses of minor proposals. Congress spends an astonishing proportion of its time on picayune matters, to say nothing of special legislation, which is by all odds the chief interest of many members. A main reason why the British House of Commons has a fair amount of time for debating important public measures, while the American House of Representatives does not, is that in the former all special, or "private," bills are handled by a procedure which requires hardly any of the time of the House as a whole.¹ It has been estimated that Congress devotes one-twelfth of its time, furthermore, to business ordinarily transacted by a city council—the business, that is to say, of the District of Columbia.

Bulk
of legis-
lation

Closely connected with this defect is the futility—and, consequently, the perfunctory character—of debate. In the Senate there is real debate, which extends to principles and not mere details and technicalities, and, with the aid of the five-minute rule, the House, when sitting as Committee of the Whole, carries on animated interchange of information and opinion. The House, however, has practically ceased to debate large measures in a large way, through the medium of carefully prepared and exhaustive speeches.² The reason is that the fate of most important bills is predetermined by decisions and acts of the speaker, the rules committee, and especially the majority caucus. Bills reported from committees are

Scarcity
of real
debate
in the
House

¹ A. L. Lowell, *Government of England*, I, Chap. xx.

² This statement may be qualified by the observation that sometimes there is real debate on finance bills.

explained briefly by the committee chairman, and perhaps other majority members, in an agreed order, and spokesmen of the minority are allowed a chance to present their views. But, with rare exceptions, no one expects votes to be changed by the arguments of either side. The general run of members have not studied the measure; they assume that the committee majority (or minority, as the case may be) has gone into the matter and knows what it is talking about; they dislike to raise trouble and, accordingly, vote almost automatically to uphold their fellow-partisans on the committee. Debate "assumes the character of shrewd fencing for position, of raising and combatting points of order, of explaining technical matters, rather than of a discussion of principles underlying a measure and their application to the facts under consideration."¹

Lack of
intelligent
and
sustained
popular
interest

Congress suffers from a dearth of interest in its work in quarters where such interest ought to be keen, and an excess of interest in other quarters where it is likely to have harmful effects. Considering that Congress every year enacts several hundreds of laws operative throughout the entire United States, and authorizes the spending of from three to four billion dollars, and taxes the people to raise these huge amounts, it might be expected that its doings from year to year, and almost from day to day, would command the attention of the general mass of citizens. That they fail to do so is not open to argument. Only when some exceptional fight over the rules, or some sensational investigation, or a filibuster, or a particularly tense debate is to be recorded, does the average newspaper—on which most people are dependent for what they know about affairs at Washington—give much prominence to congressional proceedings; so that even such publicity as there is bears, as a rule, little relation to merit. "This is due," says a public-minded editor, "on the one hand to sensational tendencies in journalism, and on the other to the fact that readers are superficial. In earlier periods newspapers were much more political in their character than at present. In those days, except for an occasional prize fight or horse race, there was no sporting news in the daily press. But nowadays the sport pages alone occupy more space regularly than the political affairs of the nation, state, and city, all put together. The financial and business pages are vastly more

¹ P. S. Reinsch, *American Legislatures and Legislative Methods*, 67. Cf. D. S. Alexander, *History and Procedure of the House of Representatives*, Chap. xv.

elaborate than political and governmental news. The theaters, and other so-called amusement interests, are also accorded more attention than the affairs of the country.¹ Many newspapers give more space by far to comic pictures that introduce the same characters in unending series than they give to all the doings of all governments, foreign and domestic. This is not remarked by way of finding fault with the newspapers. It is intended rather to help the reader understand how it happens that public opinion, in relation to the affairs of Congress, drifts so easily from indifference and neglect to impatience and disparagement."² As remarked above, a stream does not rise higher than its source; and if the people do not take a continuous, discriminating, yet appreciative, interest in what their representatives say and do at Washington, they have themselves to blame if things go wrong.

There are people, however, whose interest is unflagging. For the most part, they are the men and women who have some particular thing that they want to get from Congress, in the way either of legislation or grants or of refusal to legislate or take other action. Another of the handicaps of Congress is, thus, the undue pressure exerted by the "lobby." The lobby consists, not so much of persons seeking favors directly for themselves, as of professional paid agents of great interests or organizations, whose business it is to haunt the legislative halls and members' offices and work unceasingly for whatever objects their clients have in view. Specially active in this way at Washington are the lobbyists of the Anti-Saloon League, the National Chamber of Commerce, the American Association of Railway Executives, the American Federation of Labor, The National Coal Association, the National Petroleum Association, the Standard Oil Company, and the interests centered in the woollen, cotton, meat-packing, beet sugar, leather, and other great industries. Not all lobbying, be it noted, is reprehensible, either in object or in method. There are lobbyists for the most worthy causes as for the least worthy; and their work may be entirely open and above-board and have a desirable educational effect, just as it may follow devious courses, by dubious means, toward mercenary, or even corrupt, ends. The fact remains, however, that the footsteps of every congressman are continually dogged by men—increasing numbers of women too—whose sole aim

Lobbying

¹ So likewise are crimes and scandals.

² Albert Shaw, in *Review of Reviews*, LXVII, 339 (Apr., 1923). Cf. J. Bryce, *Modern Democracies*, II, 62-66.

is, by entreaty, promise, or threat, to influence him to vote for or against this or that particular bill, tariff schedule, subsidy, or privilege; and, as a recent writer has said, "the legislator, who tries to see things as they are and as a whole and to do his full duty in the midst of clamor and perplexity, must have poise, discrimination, and courage."¹ Scarcely an important bill passes without complaint arising in some quarter that an importunate and highly-paid lobby has had a hand in its enactment. A majority of the states have more or less effective regulations on the subject, but Congress has thus far not seen fit to impose restrictions. A committee, however, investigated the subject in 1913; the Senate in 1927 authorized an investigation of lobbying alleged to have taken place in connection with the passage of the McFadden branch-banking bill; a bill regulating the practice was before the Senate judiciary committee early in 1928; and in March of that year the Senate passed a measure requiring lobbyists to register and to file a statement of their expenses with the secretary of the Senate and the clerk of the House.²

Relative
importance
of Senate
and House

In the early days of our national history the legislative center of gravity was plainly in the House of Representatives, as the makers of the constitution intended it to be. After 1825, however, the Senate grew into greatly increased importance, becoming, indeed, the main forum of legislative activity in the days that led up to secession and the Civil War. From about 1870, the House recovered lost ground, partly because of a natural reaction against the Senate's high claims to authority (especially in the domain of foreign relations), but mainly because of the increasing proportion of senators whose principal claim to distinction was wealth or cleverness in political manipulation. But again, noticeably after about 1905, the pendulum swung back and today the Senate, if not in a clearly preponderant position, is at all events decidedly more powerful than a generation ago; an English student of the subject considers that it is even now "the only example in the world of a second chamber that is incontestably more powerful than the first."³ Furthermore, by all testimony, its importance—

¹ C. A. Beard, *American Government and Politics* (4th ed.), 283.

² F. R. Kent, *The Great Game of Politics*, Chaps. XLIII, XLV; T. M. Knappen, "The Third House of Congress," *Century Mag.*, LXXXI, 869-876 (Apr., 1922); J. K. Pollock, "The Regulation of Lobbying," *Amer. Polit. Sci. Rev.*, XXI, 335-341 (May, 1927). On lobbying in state legislatures, see the complete edition of the present book, Chap. XXXVII.

³ H. B. Lees-Smith, *Second Chambers in Theory and Practice* (London, 1923), 154.

in legislation, in finance, in control of foreign and other policy—is steadily mounting; although the oscillations just enumerated forbid the assumption that the present trend will never be reversed.

CHAP.
XXIII

In comparison with the House of Representatives, the Senate has certain distinct advantages. Its members are older,¹ have wider knowledge of public affairs, and, in particular, have greater legislative experience because of the longer term, more numerous re-elections, and the steady recruiting of vigorous members from the lower house. Its members, also, are, on the average, more important as party leaders than are the representatives. Its smaller numbers gives men of talent a better chance to show their mettle and become known to the nation at large. Its lack of effective restraint upon debate enables any and all members to hold up legislation and appropriations in a manner quite impossible in the House save in the case of a few majority leaders. With rare exceptions, senators enjoy far more patronage than do representatives; and the Senate's special powers of confirming appointments and assenting to the ratification of treaties place in its hands weapons which can be employed formidably in other spheres. Furthermore, while it is still true, as Lord Bryce remarked years ago, that neither branch of Congress attracts the best talent of the nation,² the upper house tends to draw the best talent that enters political life, so that the average in that branch is perceptibly better than in the other one, and is probably rising. Certainly the Senate today contains fewer men of wealth, and also fewer political bosses of the Hanna-Platt-Quay type, than a decade or two ago. Doubt has already been expressed as to whether this is attributable to the shift from legislative to popular election;³ but whatever the reason, the fact remains. The Senate is also far less conservative than formerly; indeed it is, on the whole, but slightly more conservative than the House. While sometimes swayed by partisan passion, and prone to "play politics," as is that body, it contains a larger proportion of members whose speeches and votes show independence of spirit and judgment; and, while handicapped by the propensity of mediocre

The
Senate's
advantages
over the
House

¹ Not notably so, however. The average age of representatives at the opening of the Seventieth Congress (December, 1927) was fifty-four; of senators, fifty-eight.

² *Modern Democracies*, II, 52. Lord Bryce's explanation of the reasons makes illuminating reading. In brief, they are: (1) the dullness of congressional duties; (2) the scant opportunities for attaining distinction; (3) the requirement of residence in the member's state or district; and (4) the exceptional opportunities which America offers for careers in other directions.

³ See p. 365.

members to stand stiffly on their rights under the rules and try the patience of the country with their obstinacy, it is composed, in at least as large degree as the House, of men who are able, industrious, fair-minded, sparing in speech, and anxious to get on with the public business.¹

REFERENCES

- E. Kimball, *National Government of the United States* (Boston, 1920), Chaps. XII-XIII.
- J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chaps. XII, XIV, XVI-XIX.
- , *Modern Democracies* (New York, 1921), II, Chap. XII.
- P. S. Reinsch, *American Legislatures and Legislative Methods* (New York, 1907), Chaps. II-III.
- S. W. McCall, *The Business of Congress* (New York, 1911), Chaps. III-VII, IX.
- D. S. Alexander, *History and Procedure of the House of Representatives* (Boston, 1916), Chaps. XI-XV, XVII.
- W. Wilson, *Congressional Government* (Boston, 1885), Chaps. II-IV.
- L. Rogers, "Notes on Congressional Procedure," *Amer. Polit. Sci. Rev.*, XV, 71-81 (Feb., 1921), and later instalments.
- , "The First (Special) Session of the Sixty-seventh Congress," *Amer. Polit. Sci. Rev.*, XVI, 41-52 (Feb., 1922); "Later Sessions of the Sixty-seventh Congress," *ibid.*, XVIII, 79-95 (Feb., 1924); First and Second Sessions of the Sixty-eighth Congress," *ibid.*, XIX, 761-772 (Nov., 1925).
- A. W. Macmahon, "First Session of the Sixty-ninth Congress," *ibid.*, XX, 604-622 (Aug., 1926), and "Second Session of the Sixty-ninth Congress," *ibid.*, XXI, 297-317 (May, 1927). These summaries give a good idea of the tone and character of congressional proceedings.
- R. Luce, *Legislative Procedure* (Boston, 1922).
- , *Congress—an Explanation* (Cambridge, 1926), Chaps. IV-V.
- L. Rogers, *The American Senate* (New York, 1926), Chaps. IV-V, VII-VIII.
- G. W. Pepper, "What Is the Senate," *Forum*, LXXIV, 863-871 (Dec., 1925).
- P. D. Hasbrouck, *Party Government in the House of Representatives* (New York, 1927), Chap. XII.
- F. W. Mondell, "What's the Matter with Congress," *Rev. of Revs.*, LXVIII, 61-72 (July, 1923).
- H. C. Lodge, *The Senate of the United States* (New York, 1921). One chapter only on this subject.
- P. W. Wilson, "Reporting Parliament and Congress," *No. Amer. Rev.*, CCXIV, 326-333 (Sept., 1921).
- G. R. Brown, *The Leadership of Congress* (Indianapolis, 1922), Chaps. XIII-XV.
- A. C. McCown, *The Congressional Conference Committee* (New York, 1927).
- Congressional Record*, published daily during sessions by the Government Printing Office at Washington (obtainable through members of Congress or by subscription through the Superintendent of Documents).

¹An exceptionally interesting and suggestive appraisal of Congress by a well-informed member of the House will be found in R. Luce, *Congress—an Explanation*, Chap. V.

CHAPTER XXIV

THE NATIONAL JUDICIARY¹

The crowning defect of the government under the Articles of Confederation, wrote Alexander Hamilton in *The Federalist*,² was the absence of a national judiciary; and in providing for "a more perfect union" the framers of the constitution declared in the preamble their purpose to "establish justice," and made provision in the third article for a system of courts distinct from the state courts and deriving existence and jurisdiction solely from the national constitution and statutes. That separate national courts were not only appropriate but almost indispensable is manifest when one considers the federal nature of our system of government. The powers of the national government were delegated and enumerated in the constitution. But who should decide when any branch of that government had exceeded the limits set in the fundamental law? The inherent powers of the states were restricted, both by express grants of power to the national government and by express limitations placed upon the states. But, similarly, who should declare and enforce these constitutional limitations?

Reasons for
a system
of national
courts

1. Enforce-
ment of
constitu-
tional
restrictions

There were three possible ways of dealing with disputes arising out of these matters. They might be left to be settled by the courts of the states involved in any given controversy; although, obviously, this would not ensure an impartial and disinterested decision. Or they might be submitted to the arbitration of states which were not concerned with the matters in controversy, after the manner of international arbitral tribunals, but this somewhat doubtful alternative was not given serious consideration. Or, again, they might be referred to courts belonging to the national government; and not only was this plan adopted, but long experience has

¹ The insertion of this chapter at the present point may seem an unwarranted interruption of the treatment of the general subject of Congress. A clear understanding of the position of the courts in our governmental system is, however, essential to a proper study of the powers of Congress, in general and in relation to such particular matters as finance, commerce, etc.

² No. XXII. See J. C. B. Davis, "Federal Courts Prior to the Adoption of the Constitution," 131 U. S., Appendix, xi-lxiii (1888).

fully established its wisdom. To be sure, in controversies between the national government and a state over the bounds of their respective spheres of authority it can hardly be maintained that the national courts constitute a completely impartial and disinterested tribunal. Looking back over the long history of adjudications in these courts, especially the Supreme Court, one can see a pronounced tendency, except during the period of Chief Justice Taney's influence shortly before the Civil War, to uphold the claims to power advanced by the national government, and to resolve most doubtful questions in favor of the national authorities. Unquestionably there has been bias in favor of the national government as against the states; and in earlier times this was a source of complaint. As national unity, self-consciousness, and pride developed, however, the strong nationalistic propensities of the federal tribunals were regarded with growing approval, and the voices of dissent are not now numerous or strong.

2. Main-
tenance of
uniformity
and su-
premac
y of national
laws

The creation of independent national courts was justified, moreover, by other considerations. If to "establish justice" meant to ensure the security of rights under the national constitution, there must be a uniform system of law, uniformly administered as the "supreme law of the land." How could uniformity and supremacy of national law be secured if the interpretation and application of the constitution, treaties, and statutes of the United States were left to the courts of the several states? Under such an arrangement there might be as many different final interpretations as there were courts. To assure any degree of uniformity, it was essential that there be a series of tribunals established and maintained by the same authority that makes the treaties and enacts the national laws. And in order that there be a really supreme law of the land, the final interpretation and enforcement of the national constitution, laws, and treaties must reside in one national court paramount to the other national courts and to the highest state courts. Inasmuch, too, as the control of foreign relations is vested exclusively in the national government, it was essential that any legal controversies concerning the status or rights of ambassadors and other representatives of foreign governments should be determined in courts established by the same authority which those governments would hold responsible for any violations of the law of nations, namely, the national government, rather than in courts deriving their authority from the state governments, with which foreign nations can have no direct dealings. Furthermore, in case

3. Juris-
diction
in inter-
national
and inter-
state dis-
putes

the national government should itself become a party to a lawsuit with its own citizens, it could hardly be expected to submit to the decisions of the courts of an inferior state government. National courts, it was also thought, would provide more impartial tribunals than state courts for the decision of boundary disputes and other controversies between two or more states, and of controversies between the citizens of the same state claiming lands under grants of two or more states, or between citizens residing in different states.

For these various reasons, the makers of the constitution decided upon a national judiciary and put into the instrument a separate article—the third—dealing with the subject. The article is not lengthy. On such matters as the number, composition, and inter-relations of the national courts, the members of the convention were not of one mind; and, rather than jeopardize the larger aspects of the plan by haggling over details, (they wisely left many things to be determined by Congress later on.) So far as the structure of the judiciary was concerned, they provided simply that the national judicial power should be vested in one Supreme Court and in such inferior courts as Congress might from time to time “ordain and establish.” But they covered the essential points: they endowed the national government with judicial power; they fixed the principle of judicial tenure during good behavior; they ordained our present Supreme Court and opened the way for the establishment of such inferior courts as might be found necessary; they protected the rights of citizens by provisions concerning the conduct of trials; they defined the crime of treason; above all, they indicated, in language of marvelous conciseness and lucidity, what the range of the judicial power of the national government should be.

In order to see what sort of national judicial system has been developed on the basis of these few and simple provisions, we must first inquire into the last matter mentioned, *i.e.*, the scope of the national judicial power. This, of course, will involve some attention to the relations between the national courts and the state courts. Then we must note the organization and workings of the Supreme Court, and of the inferior courts with which Congress has filled out the system on its structural side. Finally, something must be said of the law administered in the courts and of the relations of the judiciary to other branches of the national government.

The first fact to be noted about the scope of the federal judicial power is that the same principle holds here as elsewhere, namely, that the national government has only delegated, enumerated

powers. As applied to the judiciary, this means that the national courts have jurisdiction over only those classes of cases specified in the constitution, while the state courts have jurisdiction over all others. The grant to the federal courts is made in the following language: "The judicial power [of the United States] shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers, and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party; to controversies between two or more states;—between a state and citizens of another state;¹—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects."

Federal
jurisdic-
tion1. On
ground of
subject-
matter

A moment's contemplation of this article will show that the judicial power of the United States extends to some cases because of the nature of the matter in controversy and to others because of the status or residence of the parties concerned. The first of these two classes of cases includes (1) all cases in law and equity arising under the constitution, laws, and treaties of the United States, and (2) all cases of admiralty and maritime jurisdiction. Whenever, in any lawsuit, a right is asserted which is based upon some provision of the national constitution, laws, or treaties, or when it is asserted that some right secured by the national constitution, statutes, or treaties has been violated by the enactment of a state law or municipal ordinance, the case may be commenced in, and decided by, the federal courts; or, if commenced in a state court it may, before final decision, be removed to the federal courts. In other words, whenever it becomes essential to a correct decision of a law-suit to obtain an interpretation or application of the national constitution, laws, or treaties, the case comes within "the judicial power of the United States." Cases of "admiralty and maritime jurisdiction," also placed within the federal judicial power, have to do with offenses committed on shipboard, and with contracts which by their nature must be executed partly or wholly on the high seas or "navigable waters of the United States," *e.g.*, contracts for the transportation of passengers and freight, marine insurance policies, contracts for ships' supplies and seamen's

¹ See p. 429.

wages, and actions to recover damages for torts and other injuries. In time of war, prize cases are also included.

CHAP.
XXIV

The second general class of cases comes within the scope of the federal judicial power because of the character or residence of the parties, and comprises (1) all cases affecting ambassadors and other public ministers and consuls; (2) controversies to which the United States is a party; (3) controversies between citizens of different states; (4) disputes between citizens of the same state claiming lands under grants from different states; and (5) cases to which a state is a party. From this last class, however, have been excepted suits brought against a state by the citizens of another state or by the citizens of another country. Such cases, if triable at all, fall exclusively within the jurisdiction of the state courts and cannot be commenced or prosecuted in the federal courts.¹

2. On
ground of
the nature
of the
parties

It should be noted, however, that from the mere fact that certain classes of cases are specifically mentioned in the constitution as falling within the judicial power of the United States, it does not follow that they are thereby wholly removed from the jurisdiction of the state courts. The constitution itself gives the federal courts no *exclusive* jurisdiction of any matters whatever; for anything that appears in that instrument, the state courts may exercise jurisdiction concurrently with the federal courts over any or all of the cases mentioned. Congress alone determines by law which of these cases shall be handled exclusively by the federal courts; all others may be tried in state courts.² Under present national statutes, the federal courts have *exclusive* jurisdiction of all civil actions in which a state is a party, except those between a state and its citizens or between a state and citizens of another state or aliens; also of the following cases, arising under either the constitution or national statutes: crimes, penalties, and seizures, and all admiralty, maritime, patent-right, copyright, and bankruptcy cases;

Exclusive
or concur-
rent juris-
diction?

¹No state in the Union may be sued, even in its own courts, without its consent. In the case of *Chisholm v. Georgia* in 1793 (2 Dallas, 419) the Supreme Court sustained an action brought against the state of Georgia by a citizen of South Carolina. This was generally regarded as derogatory to the dignity of a sovereign state, and it led to the immediate adoption of the Eleventh Amendment, which excepts from the jurisdiction of federal courts cases brought against a state by citizens of another state or of a foreign state. This incident has sometimes been referred to as the earliest instance of a "recall of a judicial decision." On the suability of a state, see W. W. Willoughby, *Constitutional Law of the United States*, II, Chap. LIV.

²The laws governing the jurisdiction and procedure of the courts of the United States form what is called the federal judicial code, and may be found in *U. S. Compiled Statutes* (1918), pp. 124-224; *ibid.* (1923), pp. 49-61; *Code of the Laws of the U. S.* (1926), pp. 863-947.

and still further, of all suits and proceedings against ambassadors, or other public ministers, or their domestics, and against consuls or vice-consuls.¹ Concurrent jurisdiction is enjoyed by the federal and state courts over practically all other cases falling within the judicial power of the United States.² This means that the party instituting such a case (the plaintiff) has the option of commencing his action in a court of the state where he or the defendant resides, or of bringing it in a federal court.

In criminal cases it may happen that the same offense is punishable by the state authorities in the state courts and by the federal authorities in the federal courts. This is true, for example, in cases of fraud, if use has been made of the mails. Similarly, if a package is stolen from a freight-car moving in interstate commerce, the theft is a crime punishable under both state law and national law. And the fact that a person has been successfully prosecuted for such an offense in a state court is no bar to his prosecution and conviction in the federal courts. In such an event, the defendant is being tried in different jurisdictions for offenses against different sovereignties.³

How cases
get into
the federal
courts:

1. Original
jurisdiction

2. Removal
from state
courts

The actual appearance of cases upon the dockets of various federal courts may be accounted for in one or another of three ways. Most numerous are the cases over which the federal courts have been given exclusive jurisdiction; and these are, of course, begun and ended in that forum. The least numerous are the cases which might have been commenced in either a state or a federal court, at the option of the plaintiff, but have actually been commenced in a state court and thereafter have been transferred at the request of the defendant to a federal court to be finally disposed of there. Such removal is permissible when either one of two facts can be shown to exist; namely, that the parties reside in different states, or, if they reside in the same state, that a right or immunity is called in question which is based upon the national constitution, laws, or treaties. In the first instance the case is said to have been removed by reason of the "diverse citizenship" of the parties; in the sec-

¹ *Code of the Laws of the U. S.* (1926), pp. 907-908.

² In a few instances Congress has left jurisdiction wholly to the state courts; e.g., suits between citizens of different states where no federal question is involved and the amount in controversy is less than \$3,000. These cases may not be brought into the federal courts at all, either originally, by removal, or by appeal. J. P. Hall, *Constitutional Law*, 354.

³ The punishment of the same offense by both the federal and state governments is sometimes mistakenly spoken of as violating the "double jeopardy" provision of the Fifth Amendment. On double jeopardy, see C. K. Burdick, *The Law of the American Constitution*, 395-399.

ond, removal has taken place because a "federal question" is involved; in either event the removal must take place before the state courts have entered final judgment.¹ Almost without exception, such removal cases go directly to an inferior federal court, rather than to the Supreme Court, although they may ultimately reach that tribunal if an appeal is taken from the decision of the lower court. Removals of this sort are permitted in order to place the defendant on an equal footing with the plaintiff, who had the choice between the federal and state courts when he brought his suit; and also in order to protect the defendant from the danger of local prejudice. Finally, cases get into the federal courts as the result of appeals from the decisions of the highest court in the state where the action originated. Whenever it becomes necessary for such a state court, in deciding a case, to uphold or deny any right claimed under the national constitution, laws, or treaties, the defeated party may take an appeal, not to an inferior federal court, but directly to the Supreme Court; and there the rights asserted on the one side and denied on the other receive final adjudication.

CHAP.
XXIV

3. Appeal
from state
courts

From the point of view of the kinds of law which the federal courts are called upon to administer, the cases which come before them in one or another of the foregoing ways fall into two great divisions, criminal and civil. The only criminal jurisdiction belonging to the federal courts is such as has been conferred by act of Congress; and Congress, of course, has no authority to define crimes and fix penalties except as it is derived, directly or indirectly, from the constitution. In only five kinds of cases has that instrument directly conferred this authority, namely, (1) piracies and felonies committed on the high seas; (2) offenses against the law of nations, or international law; (3) counterfeiting the securities and current coin of the United States; (4) treason against the United States; and (5) offenses committed in the District of Columbia, in all places wholly under national control, such as forts and arsenals, and in the territories and dependencies, where Congress has ample authority to define crimes and determine their punishments.²

Kinds of
law admin-
istered

1. Crim-
inal law

If, however, the criminal dockets of the federal courts comprised only cases falling within these five classes, the criminal jurisdiction of these tribunals would be quite unimpressive. Actually, the power of Congress to define crimes and provide for

Statutory
crimes

¹J. C. Rose, *Jurisdiction and Procedure of the Federal Courts* (2nd ed., 1922), Chaps. VIII, IX, XIII.

²The federal criminal code will be found in *Code of the Laws of the U. S.* (1926), pp. 459-521.

their punishment is very much greater than the above enumeration would indicate; for whenever Congress has authority under the constitution to pass a law upon a given subject, it has the implied, or resulting, power to make that law effective by providing that infractions thereof shall be treated and punished as crimes. The power to establish post-offices, for example, carries with it the implied power to punish the crime of robbing the mails. The most numerous class of criminal offenses now before the federal courts has arisen from violations of laws passed to enforce the prohibition amendment to the constitution. Cases of this sort greatly outnumber all other federal offenses put together, and they have so enormously added to the criminal work of the courts as to necessitate the creation of about thirty new district judgeships since 1922.¹

Procedure in federal criminal cases² is regulated in a large measure by those provisions of the early amendments which are designed to protect the rights of persons accused of crimes by surrounding them with the safeguards against arbitrary and irregular prosecutions originally embodied in the English Bill of Rights of 1689. No civilian, for example, may be put on trial for a federal offense (except a misdemeanor) unless he has been indicted by a grand jury, nor be compelled to testify against himself in any criminal case, nor be deprived of life, liberty, or property without due process of law. Persons accused of crimes are entitled to a speedy and public trial by an impartial jury; to a trial in the vicinity where the crime was committed, in order to facilitate the obtaining of witnesses; to be furnished with an exact copy of the indictment; to have witnesses subjected to cross-examination in their presence; to have compulsory process for obtaining witnesses; to have the assistance of counsel for their defense; and to be admitted to bail in a reasonable sum, pending their trial. Furthermore, no person may be twice subjected to trial in a federal court for the same offense if he has once been acquitted on the charge. Criminal prosecutions are instituted and their trials are conducted, on behalf of the government, by district attorneys appointed by the president upon recommendation of the attorney-general, for each of the eighty-two districts into which the states are divided.

¹ *U. S. Compiled Statutes* (1923), pp. 49-50.

² See Rose, *op. cit.*, Chap. IV. The only provision in the constitution's "bill of rights" relating to civil procedure is Art. VII, which guarantees a trial by jury in all civil cases in which the amount in controversy exceeds twenty dollars.

In exceptionally important and complicated cases a special district attorney is appointed to represent the government; and the territories have their district attorneys serving in a similar capacity.

CHAP.
XXIV

Far outnumbering the criminal cases are the civil cases, which constitute the second great division of actions tried in the federal courts. On the basis of the law administered, three distinct sorts of civil cases must be distinguished: cases at law, cases in equity, and admiralty cases. Cases at law comprise mainly actions arising out of civil wrongs, called torts, and actions based upon contracts, either express or implied. They rest upon some principle of the old common law of England, or upon some state or federal statute; and they are tried in accordance with the rules of the English common law, or modifications thereof provided for by state¹ or federal statutes. In most actions at law the redress sought is money damages, and the remedy is granted only after the wrong has been committed or the contract has been broken. At common law, such actions could be brought into the courts only when they could be fitted into some one of about a half-dozen stereotyped and rigid forms of action, such as assumpsit, trover, trespass, replevin, etc. But cases were constantly arising, as they do nowadays, in which substantial justice, or equity, could not be obtained under any of these common-law actions, or even by the award of money damages. There are many cases, for example, in which the granting of money damages to the injured party is an inadequate remedy by reason of the fact that the defendant may refuse to pay the judgment obtained against him and has no property which can be seized and sold to satisfy the judgment. Or it may happen that, owing to the nature of the contract upon which the action is based, it is impossible to estimate the amount of damages which would result from a non-fulfilment of the agreement. In still other cases a contract may be involved—for example, a deed conveying title to real estate—which is perfectly regular and legal on its face and is executed with due formality, but the circumstances surrounding its execution may have been tainted by fraud, intimidation, or undue influence.

2. Civil
law

(a) Cases
at law

With a view to supplementing the usual common-law remedies

¹ In the decision of many cases based upon diverse citizenship of the parties the courts are not called upon to interpret or apply any phase of national law, but merely state laws. For example, if a suit is brought between citizens of New York and Pennsylvania regarding land in Pennsylvania, the only law involved in the case and applied by the federal court is the local law of Pennsylvania. See J. P. Hall, *Constitutional Law*, 361-364.

and doing "substantial justice," in such cases as these, by disregarding the inflexible "forms of action," the equity jurisdiction of English and American courts has been built up through the centuries. How equity proceedings accomplish this object will be easily understood if we follow out each of the illustrations given above. Labor strikes often result in injury or destruction of property for which no adequate money damages can be collected. In equity proceedings a federal court may, by issuing a writ of injunction,¹ command the strikers and their sympathizers to refrain from injuring or destroying property belonging to the employer. Any violation of the terms of an injunction constitutes an offense known as contempt of court, which may be punished severely and summarily by the court whose injunction has been disregarded, in most cases without benefit of jury trial for the guilty parties.² In this fact, and in the additional point that injunctions may be issued in advance of any actual injury or destruction, as a means of *preventive* justice, lies the superiority of equity proceedings in such cases over the only alternative at common law, namely, an action for damages after property has been injured or destroyed.

In the second example given above, where it is impossible to estimate the amount of damages that might result from a breach of contract, as when the owner of a valuable race-horse has agreed to sell that horse—the only one the purchaser wants. If this contract is broken, a court, in equity proceedings, will, by a decree of specific performance, order the owner to carry out the agreement. Failure to do so thereafter will subject the owner to contempt proceedings. In the third class of cases in which the common law furnishes no adequate remedy, a court in equity proceedings may entirely set aside a deed for the transfer of property if it is shown to the satisfaction of the court that the circumstances surrounding the execution of the deed were tainted by fraud, duress, or the exercise of undue influence.

¹ An injunction is a writ issued by a court commanding an individual, a group of persons, or a corporation to do, or to refrain from doing, certain acts described in the writ. The writ is of very early English origin, and the right to issue it is not peculiar to the federal courts but belongs to the state courts as well. Injunctions have been employed so frequently in recent years in labor disputes that labor leaders have been loud in their denunciation of what they call "government by injunction." See A. C. McLaughlin and A. B. Hart, *Cyclo. of Amer. Govt.*, II, 179-181.

² The Clayton anti-trust law of 1914 provided for trial by jury in cases of *indirect* contempt arising out of labor disputes, that is, for acts done outside the presence of the court and not interfering with the performance of judicial functions. This was upheld by the Supreme Court in *Michaelson v. United States*, 263 U. S. 698 (1923); 45 Sup. Ct. Rep., 10 (1924).

The rules and remedies peculiar to equity practice and procedure are enforced by the same federal judges who administer the principles and rules of the common law, and it is always necessary in equity proceedings to establish the fact that the party seeking equity has no adequate remedy at law before a judge will apply the appropriate equity relief. In its long history in England and in this country equity has come to have its own elaborate and highly technical code of rules and precedents parallel to the complicated rules and procedure in common-law actions. Such rules as are observed and enforced in our federal courts are drawn up, and at long intervals revised, by the judges of the Supreme Court.

CHAP.
XXIV
No
separate
equity
courts

Not only do the same federal judges administer common law and equity, but they also administer admiralty and maritime law in cases of tort and contract connected with shipping and water-borne commerce on the high seas or "navigable waters of the United States." Such cases are tried and determined in accordance with the highly technical and peculiar rules of the admiralty code inherited from England and modified by acts of Congress. In prize and piracy cases the judges sitting in admiralty courts also administer international law.¹

(c) Admi-
ralty cases

Having seen the scope of the national judicial power, something of the relations between the national courts and the state courts, the different ways in which cases get into the federal courts, and the kinds of law which federal judges are called upon to administer, we are in a position to take up the actual structure or organization of the courts comprised in the federal judicial system. Only one such court, the Supreme Court, is definitely provided for in the constitution; all the others have been created, and their jurisdiction has been determined, by acts of Congress passed at various times, beginning with the judiciary act of 1789, which forms the basis of the present organization.²

Structure
of the
federal
judicial
system

First, in logical order, come the courts of first instance, called district courts, of which there are, in the states, eighty-two (1926).³

1. District
courts

¹ W. W. Willoughby, *Constitutional Law of the United States*, II, Chaps. LV.

² A large diagram of the federal judicial system, with reference to appeals, etc., may be found in *U. S. Daily*, Sept. 29, 1926. Cf. C. Warren, "New Light on the History of the Federal Judiciary Act of 1789," *Harvard Law Rev.*, XXXVII, 49-132 (Nov., 1923).

³ There is also a district court in Alaska, Hawaii, Porto Rico, and the Canal Zone. *Register of the Department of Justice and the Courts of the United States* (31st ed., 1926), 29 ff.

A small state, such as Vermont or New Hampshire, may constitute a district by itself; larger or more populous states may be divided into two or more districts; and in still other cases a district may consist of parts of two or more states. In every district there is at least one district judge, appointed by the president and Senate on recommendation of the attorney-general. In the more populous districts there may be two, three, or even six, district judges, the number depending upon the amount of litigation. Where there is more than one such judge the district court holds its sessions in different "divisions" simultaneously, each division being presided over by a single judge. In all, there are (1928) one hundred and thirty district judges.¹

Their
jurisdiction

The variety of cases that may be brought in the district court is so great that only a few of the more important can be mentioned here. All federal crimes are prosecuted in these tribunals, including prosecutions under the anti-trust laws.² Over claims against the United States involving less than \$10,000 the district court has concurrent jurisdiction with the Court of Claims.³ Admiralty cases, suits arising under the internal revenue, postal, copyright, patent, and bankruptcy laws, or under any law regulating commerce, and likewise cases removed to a federal court from a state court before final judgment are triable in the district courts. In a few cases appeals may be taken directly to the Supreme Court; but in cases where the jurisdiction of the district court is questioned, and whenever the constitutionality of a federal or state law is involved, appeals first go to the circuit court of appeals. The district court itself has no appellate jurisdiction whatsoever; the common impression that cases may be appealed from the highest state courts to the federal district court is quite erroneous. Cases, however, are frequently removed to the district court from state courts before

¹ The salary of a district judge is \$10,000.

² During the first half-century under the constitution the state courts had concurrent jurisdiction over federal crimes. C. Warren, "Federal Criminal Law and the State Courts," *Harvard Law Rev.*, XXXVIII, 545-598 (Mar., 1925). To meet the recent increase in the number of criminal cases, it has been strongly urged that new federal "police courts" be created for the trial of petty offenders and misdemeanors without indictment and without a jury. See address of E. B. Buckner, U. S. district attorney for the Southern District of New York, in *N. Y. Times*, June 5, 1925; F. Frankfurter and T. G. Corcoran, "Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury," *Harvard Law Rev.*, XXXIX, 917-1019 (June, 1926); R. W. Moore, "Relieving the United States District Courts," *Virginia Law Rev.*, XIII, 269-277 (Feb., 1927).

³ *Code of the Laws of the U. S.* (1926), pp. 867-868.

final decision there, if the parties are citizens of different states or if some "federal question" is involved.¹

CHAP.
XXIV

Next in order come the circuit courts of appeals, one of which is found in each of the nine great judicial circuits into which the country has been divided. The judges who hold these courts are usually circuit judges, although district judges may be called in to serve.² The justices of the Supreme Court also have a right to sit with the court of appeals of their respective circuits, although they seldom find time to do so. In circuits having the largest amount of litigation or greatest area there are six circuit judges; in other circuits, three or two. In any case, two judges constitute a quorum. If the judges are equally divided, the case may be certified to the Supreme Court for instructions or for final decision. As one might infer from its title, the circuit court of appeals has no original jurisdiction; its work is confined wholly to cases appealed from the district courts and to the enforcement and review of certain classes of orders issued by the Interstate Commerce Commission, the Federal Trade Commission, and the Federal Reserve Board. Its decision is final in suits between aliens and citizens, between citizens of different states where no federal question is involved, and in cases arising under the criminal, patent, copyright, bankruptcy, and revenue laws, or the law of admiralty (except prize cases), when the amount in controversy does not exceed one thousand dollars.³ Nevertheless, in any of these instances the Supreme Court may, upon the petition of either party, and before final decision, order the case transferred to itself for review and final decision. The original purpose in the creation of the circuit courts of appeals was to relieve the Supreme Court of some of its appellate jurisdiction, and thus to expedite the final adjudication of large classes of cases.

2. Circuit
courts of
appeals

Until 1922, the district courts, and likewise the circuit courts of appeals, were virtually independent units, without a supervising or unifying head. When work grew excessive in one district or circuit, the usual remedy was for Congress to create a new judgeship or two, although there might be a dozen judges in other districts or circuits with comparatively little to do. Even so, the creation of

Unified
adminis-
tration
of courts

¹ *Code of the Laws of the U. S.* (1926), pp. 870-873, 2025-2031.

² The salary of a circuit judge is \$12,500.

³ *Code of the Laws of the U. S.* (1926), pp. 895-896, 2031-2032; M. T. Mantou, "Organization and Work of the United States Circuit Court of Appeals," *Amer. Bar. Assoc. Jour.*, XII, 41-46 (Jan., 1926). The appellate jurisdiction of the circuit courts of appeals was considerably enlarged by act of Congress in 1925 (see references on p. 442 n).

judgeships did not keep pace with the growth of judicial business, so that in 1921 the federal courts were over 120,000 cases in arrears. In the following year, however, Congress passed an important act opening the way for the long-needed unification and equalization of court work.¹ Under this law, the chief justice of the Supreme Court becomes a real supervising and directing head for the whole federal judicial system. He is required to summon annually, and to preside over, a judicial council made up of the senior circuit judges of the nine circuits. It is made the duty of this council to advise as to the needs of the courts in their respective circuits, and how the administration of justice may be improved generally. The law further requires every district judge to file an annual report setting forth the condition of business in his district, including the number and character of cases on the docket, the business in arrears, the cases disposed of, and recommendations for judicial assistance needed for the disposal of business during the ensuing year. On the basis of these reports the council is required to make "a comprehensive survey of business in the courts . . . and prepare plans for assignment and transfer of judges to or from circuits and districts" as circumstances may make desirable; and to submit suggestions to the various courts "in the interest of uniformity and expedition of business." These and other provisions of the law cannot fail to impart a degree of unification and flexibility in handling court business which has been conspicuously lacking in the past. The reform thus made in the administration of the federal courts has furthered the adoption of similar improvements in state courts, where the need is perhaps even greater.²

At the head of the federal judicial system—in a sense, at the head of the whole judicial system of the United States—stands the Supreme Court. Whereas the creation of the national courts described above was left optional with Congress, the establishment of one court which should be supreme was made mandatory by the constitution; although even here the details of organization and jurisdiction are largely left to congressional action. The Supreme

¹ *U. S. Compiled Statutes* (1923), p. 55; *Code of the Laws of the U. S.* (1926), pp. 893-894; *Jour. Amer. Judic. Soc.*, VI, 69-72 (Oct., 1922).

² W. H. Taft, "Possible and Needed Reforms in the Administration of Civil Justice in the Federal Courts," *Jour. Amer. Judic. Soc.*, VI, 36-47 (Aug., 1922). The proceedings of the first meetings of the judicial conferences are summarized in *Texas Law Rev.*, II, 458-463 (June, 1924), and *Harvard Law Rev.*, XL, 431-468 (Jan., 1927). The full text of the report for 1927 appears in *Annual Report of the Attorney-General of the United States* (1927), 4-8.

Court was first organized under the Judiciary Act of 1789 with a chief justice and five associate justices. Since then the total number of judges has once been as high as ten, although at the present time (as for some years past) the court consists of nine members.¹ All are appointed by the president and Senate and hold office for life or during good behavior. They receive salaries which are fixed from time to time by Congress, subject to the single constitutional restriction that no judge's compensation shall be diminished while he continues in office. The chief justice now (1928) receives \$20,500, and the associate justices \$20,000.

CHAP.
XXIV

Although receiving slightly higher compensation, the chief justice has, in reality, no more legal weight or influence in deciding cases than any of the associate judges. He is simply the presiding justice at sessions of the court, in which he acts as a sort of chairman in assigning to his associates the task of writing the court's decisions in cases that have been heard and discussed. His position in this respect does not, however, exempt him from performing his share of this kind of work. He also appoints members of the court to serve on committees which now and then prepare a revision of the rules governing equity procedure or the rules of practice in actions at law. In all, ten chief justices have presided over our highest judicial tribunal since its foundation. In chronological order, they are: John Jay, 1789-1795 (resigned); John Rutledge, 1795-1796;² Oliver Ellsworth, 1796-1800 (resigned); John Marshall, 1801-1834; Roger B. Taney, 1836-1864; Salmon P. Chase, 1864-1873; Morrison R. Waite, 1874-1888; Melville W. Fuller, 1889-1910; Edward D. White, 1910-1921;³ and William H. Taft,⁴ 1921—. The outstanding figure in the list is John Marshall,⁵ who presided over the Court for more than thirty years and because

The chief
justice

¹ E. G. Lowry, "The Men of the Supreme Court," *World's Work*, XXVII, 629-641 (Apr., 1914).

² John Rutledge presided at only one session of the Court; his appointment was not confirmed by the Senate because of failing mental powers. He had served as associate justice from 1789 to 1791, when he resigned to become chief justice of the Supreme Court of South Carolina.

³ Chief Justice White had previously served as associate justice from 1894 to 1910. He and John Rutledge are the only associate justices who have been advanced to the chief justiceship.

⁴ S. Spring, "Two Chief Justices" [White and Taft], *Rev. of Revs.*, LXIV, 161-170 (Aug., 1921).

⁵ On the influence of Chief Justice Marshall, see series of addresses delivered at the centennial celebration of his appointment, *John Marshall, Life, Character, and Judicial Services*, 3 vols. (Chicago, 1903); W. E. Dodd, "Chief Justice Marshall and Virginia," *Amer. Hist. Rev.*, XII, 776-787 (July, 1907); E. S. Corwin, *John Marshall and the Constitution* (New Haven, 1919); and A. J. Beveridge, *Life of John Marshall*, 4 vols. (Boston, 1916-19).

of his forceful and winsome personality, his firm and clear convictions in favor of a liberal construction of the powers of the national government, and the masterful logic and lucidity of style with which those convictions were expressed in many a notable decision during the formative period of our national institutions, is justly regarded as "the second father of the constitution." There have been associate justices also whose personality and influence upon our constitutional history entitle them to special mention, namely, James Wilson, 1789-1798; Joseph Story, 1811-1845; Stephen J. Field, 1863-1897; John M. Harlan, 1879-1911; and Oliver Wendell Holmes, 1902—.¹

Sessions

Each member of the Supreme Court is assigned to one of the nine judicial circuits into which, as we have seen, the country has been divided;² and in early days the justices traveled about, holding sessions of the circuit or the district court at different places, and coming together at stated intervals at the capital for a session of the Supreme Court. Nowadays, however, the pressure of business at Washington is altogether too great to permit them to "go on circuit." Sessions of the court are held annually in the old Senate chamber in the Capitol, beginning each year in October and lasting until about May. Six justices must be present at the argument of a case, and a majority must concur in any decision. When the Court is evenly divided, or the members differ so widely that a majority cannot reach an agreement, it is customary to order a rehearing of the case, after which it is usually possible to arrive at some sort of a conclusion.³

Decisions
and
"opinions"

The decisions or conclusions arrived at in each case are accompanied by more or less extended "opinions" showing the line of reasoning by which the Court reached its decision. Justices who concur in the decision of the majority may have arrived at that result in different ways: in such instances, one or more of them may write a "concurring" opinion. Those who are unable to concur in the decision of the majority are likewise permitted to

¹ See O. K. McMurray, "Field's Work as Lawyer and Judge in California," *Cal. Law. Rev.*, V, 87-107 (Jan., 1917); W. C. Jones, "Justice Field's Opinions on Constitutional Law," *ibid.*, V, 108-128 (Jan., 1917); F. B. Clark, "The Constitutional Doctrines of Justice Harlan," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XXIII (1915); D. Richardson, "Constitutional Doctrines of Justice Oliver Wendell Holmes," *ibid.*, XLII (1924).

² Maps showing the different circuits and the places where federal courts are held will be found in *Register of the Department of Justice and the Courts of the United States* (30th ed., Washington, 1924), 155-166.

³ A notable instance of this occurred in 1895, when the income tax law of 1894 was held unconstitutional (*Pollock v. Farmer's Loan and Trust Co.*).

write "dissenting" opinions.¹ All of these opinions are regularly published by the government, for the benefit of the legal profession and the general public, in a series of volumes known as *Reports*² and prepared under the editorial supervision of a reporter of decisions appointed by the Court. Decisions are handed down by the Supreme Court only in cases that come before it in one of the two ways about to be described. The principle was early established that the Court would refrain from submitting advisory opinions concerning matters presented to it by either Congress or the president.³

CHAP.
XXIV

Cases come before the Supreme Court in one of two ways. A few may be commenced there, and over these the Court is said to have "original" jurisdiction. The constitution itself specifies that the Supreme Court shall have original (although not necessarily exclusive) jurisdiction in "all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party."⁴ In view of this provision, Congress may not enlarge the original jurisdiction of the Court, for that would be in effect amending the constitution in an unauthorized manner.⁵ The great majority of cases, on the other hand, come to the Supreme

Jurisdiction

¹ J. H. Clarke, "How the United States Supreme Court Works," *Amer. Bar Assoc. Jour.*, IX, 80-82 (Feb., 1923).

² Reports of Supreme Court decisions handed down before 1874 are usually cited by the name of the reporter who prepared them for publication, as follows: Dallas, 4 vols., 1790-1800; Cranch, 9 vols., 1801-1815; Wheaton, 12 vols., 1816-1827; Peters, 16 vols., 1828-1842; Howard, 24 vols., 1843-1860; Black, 2 vols., 1861-1862; and Wallace, 23 vols., 1863-1874. Since 1874 the Reports have been numbered consecutively, beginning with Volume 91, and are cited as 91 U. S., etc.

³ Recently the solicitor-general (James M. Beck) publicly proposed that whenever Congress by joint resolution approved by the president should require from the Supreme Court an advisory opinion on proposed legislation of doubtful constitutionality, the court should comply. The first and only time in its history when the Supreme Court rendered an advisory opinion was in Monroe's administration. The question then submitted by the president related to the constitutionality of federal appropriations to be expended wholly within a single state, and the court's opinion was favorable. The supreme court in eight states is empowered to hand down advisory opinions. Objections to advisory opinions are set forth in *Constitutional Rev.*, VIII, 231-237 (Oct., 1924).

⁴ On interstate disputes, see C. Warren, *The Supreme Court and Sovereign States* (Princeton, 1924).

⁵ In 1789 Congress conferred original jurisdiction upon the Supreme Court in mandamus cases, and for that reason a part of the Judiciary Act of 1789 was held void by the Supreme Court in the famous case of *Marbury v. Madison*, 1 Cranch, 137 (1803). A mandamus is a writ issued by a court commanding a public officer, a corporation, or an inferior court to perform a specified duty imposed by some law. It must also be a ministerial duty, not one involving the exercise of any discretion by the party to whom the writ is directed. The right to issue this writ, and a number of other important writs, belongs to both federal and state courts.

Court on appeal from either a lower federal court or the highest state courts. Appeals from the latter, however, may be carried to the Supreme Court only when some federal question is involved.¹

By far the most important and distinctive function of the Supreme Court is performed when that tribunal decides appeals from the highest state courts and passes upon other federal questions coming before it from the lower federal courts; for, in so doing, it acts as the guardian of the constitution, the upholder of the supremacy of national laws, and the defender of the reserved rights of the states. This will appear more clearly if we distinguish two large classes of cases coming before the Supreme Court for final judgment: (1) cases in which it is asserted that a state statute or a provision in a state constitution is in conflict with some clause in the national constitution, or with an act of Congress, or with some national treaty; and (2) cases in which some right or authority or immunity claimed to be derived from the national constitution, statutes, or treaties is in dispute.

As an illustration of what occurs in the first class of cases, let us suppose that A., relying upon the validity of a statute passed by his state legislature, brings suit against B. in the appropriate state or federal court, and that, in the course of the litigation, B. denies in legal form that A. has the right claimed under the state law, on the ground that this law is inconsistent with the national constitution, or with a law or treaty of the United States, and for that reason is no "law" at all. Therefore, since the constitution, laws, and treaties of the United States are declared to be "the supreme law of the land," B. prays the Supreme Court to declare null and void the state law upon which A. relies to win his suit. In order to determine the rights of the parties in such a case, the Supreme Court is obliged to declare whether, in its judgment, the state law in question is inconsistent (a) with any clause in the

¹A leading case on the appellate jurisdiction of the Supreme Court is *Martin v. Hunter's Lessee*, 1 Wheaton, 304 (1816). Appeals from the Supreme Court of the Philippine Islands may also be taken to the United States Supreme Court. Appeals from the District Court of Alaska and the Supreme Court of Hawaii and of Porto Rico, which formerly went to the Supreme Court, now go to the Circuit Court of Appeals. *Code of the Laws of the U. S.* (1926), pp. 895-896, 905-907.

Important changes in the appellate jurisdiction of the Supreme Court, made by act of Congress in 1925, are discussed in P. Blair, "Federal Appellate Procedure as Affected by the Act of February 13, 1925," *Columbia Law Rev.*, XXV, 393-407 (Apr., 1925); C. W. Bunn, "The New Appellate Jurisdiction in Federal Courts," *Minn. Law Rev.*, IX, 309-313 (Mar., 1925); W. H. Taft, "The Jurisdiction of the Supreme Court of the United States under the Act of February 13, 1925," *Central Law Jour.*, XCIX, 149-157 (May 5, 1926).

constitution granting exclusive authority to the national government, or (b) with any valid act of Congress, or (c) with any provision of a treaty of the United States, or (d) with any express limitation imposed upon the states by the constitution. If a majority of the members of the Court are convinced that the inconsistency asserted by B. actually exists, the justices, under their oath to support the constitution and laws of the United States as the "supreme law of the land," will refuse to enforce the rights claimed by A. The state statute thus held to be "unconstitutional" may remain on the statute-book for years, until the legislature sees fit to repeal it; but every one knows that if a similar case were to arise, the Court would, in all probability, reach the same decision. Therefore, for all practical purposes, the law is null and void, and the Supreme Court is said to have "nullified" it. In this way the Court becomes the organ for declaring and enforcing the constitutional limitations upon the state governments mentioned at the beginning of this chapter. If, instead of an act of a state legislature, the validity of a clause in a state constitution had been in dispute, the court would likewise have been obliged to declare it null and void if a majority of the justices found it repugnant to anything in the national constitution, laws, or treaties.

Cases of the latter sort are comparatively rare. But cases involving the constitutionality of state legislation are very numerous. Some state laws are alleged to infringe the right of Congress to regulate interstate commerce; others are said to impair the obligation of contracts, which is prohibited; a very much larger number are challenged because they are thought to be in conflict with clauses in the Fourteenth Amendment prohibiting the states from depriving any person of life, liberty, or property without "due process of law," and from denying to any person "the equal protection of the laws." The state statutes which are most frequently brought into controversy under these clauses are those enacted for the purpose of restricting the rights of liberty and property in order to promote and protect the public health, morals, safety, and general welfare; in other words, legislation enacted under the "police power." Such legislation is almost certain to be upheld if the Supreme Court is satisfied that the law in question does not amount to an "unreasonable" interference with the rights of liberty and property, and that it bears a direct relation to the protection of the public health, morals, or safety, or to the promotion of the general welfare. On the whole, the Supreme Court

has been rather more liberal in its interpretation of the vague phrases "due process of law" and "police power" than many state courts have been when the same or similar questions have come before them.¹ Indeed, some of the decisions of the Supreme Court in such cases in the past ten or twenty years have had a most important liberalizing influence upon certain of the ultra-conservative state courts, as is shown by many decisions of these courts when passing upon the constitutionality of important laws enacted primarily for the welfare of the wage-earning classes.²

In all of the foregoing cases the Supreme Court serves either as the guardian of the powers of the national government against encroachments by the states or as the enforcer of the constitutional prohibitions upon the states. Turning to the second class of cases, *i.e.*, those in which one party asserts, and the other denies, some right or immunity derived directly from the national constitution, statutes, or treaties, we find the Supreme Court acting both as the guardian of the reserved rights of the states and as the medium through which the legislative and executive branches of the national government are restrained from overstepping the boundaries marked out for them in the fundamental law; and this function has resulted from the Court's performance of its ordinary judicial duties quite as naturally and logically as has its power to declare state laws unconstitutional. In order to make this clear, let us suppose that Congress has passed a law prohibiting the transportation in interstate commerce of goods in the manufacture of which children under the age of sixteen have been employed. Let us suppose also that A. is prosecuted by the Department of Justice for violating this law, and that he admits the facts as charged. In his defense, however, he asserts that the penalty named in the law should not be enforced against him, for the reason that the act of Congress on which the prosecution is based is not a regulation of commerce, which Congress is authorized to enact, but rather an attempt to regulate manufacturing within the state, a subject over which Congress has been granted no authority and which, therefore, is left to be regulated exclusively by the states. Here, clearly, is a dispute over the boundaries of national and state authority which calls

¹ See R. A. Brown, "Due Process, Police Power, and the Supreme Court," *Harvard Law Rev.*, XL, 943-968 (May, 1927), and E. S. Corwin, "Judicial Review in Action," *Univ. of Penn. Law Rev.*, LXXIV, 639-671 (May, 1926).

² A. M. Kales, "New Methods in Due Process Cases," *Amer. Polit. Sci. Rev.*, XII, 241-250 (May, 1918); R. L. Mott, *Due Process of Law*, etc. (Indianapolis, 1926).

for interpretation of the commerce clause of the constitution, and which must be decided by the Court before it can determine whether to order the enforcement of the penalty prescribed in the law.¹

CHAP.
XXIV

How does the Supreme Court meet such a question? Starting with the premise that the national government is a government of limited powers, which are enumerated in the constitution, that this constitution is the fundamental law to which all other laws and official acts of the government must conform, and that the law-making branch of the government may legally exercise no power for which warrant cannot be found in the constitution, the Court addresses itself to the task of examining the constitution to see if authority to pass this child labor law has been conferred directly or by implication. If it becomes convinced that Congress has exceeded its authority as measured by the constitution (particularly the commerce clause), the Court will refuse to enforce the penalty against A. as demanded by the Department of Justice. The law is declared to be "unconstitutional," and is commonly said to be null and void thereafter, although it may remain on the statute-books for many years.² Speaking strictly, all that the Court does is to refuse to order the enforcement of the penalty against A., because the alleged law prescribing the penalty is in fact no law at all. But the public knows that a law, or alleged law, which the courts will not enforce is for all practical purposes null and void. If the validity of a national treaty provision is challenged in the course of litigation between parties, a similar line of reasoning is followed by the Court in order to ascertain whether the treaty-making organs of the government have exceeded their authority. In the same manner, too, the Court may be called upon to decide whether an act of Congress encroaches upon the sphere marked out by the constitution for either the judiciary or the executive; and if it does, the Court will be obliged to decline to enforce the law. Thus are the different branches of the government kept within the bounds set for them by the constitution—at least as that instrument is interpreted by the Supreme Court.

How a
measure is
"declared
unconsti-
tutional"

When the Supreme Court has defined the scope and meaning of clauses in the constitution which are involved in the decision of

Weight
attaching
to Supreme
Court
decisions

¹ Substantially this same question arose in connection with the child labor act of 1916, held unconstitutional in *Hammer v. Dagenhart*, 247 U. S., 251 (1918).

² See O. P. Field, "Effect of an Unconstitutional Statute," *Amer. Law. Rev.*, LX, 232-253 (Mar.-Apr., 1926).

specific cases, its rulings remain the final authoritative declaration of law upon that point until, as only rarely happens, this decision is reversed or modified;¹ and, as we have seen, under the influence mainly of Chief Justice Marshall, the federal courts, and especially the Supreme Court, have applied such liberal canons of interpretation as to result in a "judicial expansion" of the constitution whereby its various provisions, adopted and given effect in the light of eighteenth-century conditions, have been stretched and adapted to meet the vastly different and wholly unforeseen conditions of the twentieth century without the necessity of numerous formal amendments.

This power of the Supreme Court to declare acts of Congress and provisions in national treaties unconstitutional, and so virtually to nullify them, is thus seen to be the natural and logical working out of the ordinary judicial function of determining the rights of parties to litigation coming before it. Naturally, in exercising this far-reaching power the members of the Court are, like other men, consciously or unconsciously influenced more or less by their individual political, social, and economic theories, which, in turn, are largely the product of their past training and environment.² It would be surprising, therefore, if, in interpreting so broad and indefinite a phrase as "due process of law," the Court did not seem to read into the constitution the political and economic beliefs of the individual judges, thus furnishing ground for the statement sometimes made that "due process is what the Supreme Court says it is;" and it is not strange that on several occasions, the Court has become an object of partisan political controversies.³ In the presidential campaign of 1924, for example, the Progressive party and its presidential candidate, the late Senator La Follette, denounced this power of the Court, advocated popular election of all federal judges for limited terms, and proposed a constitutional amendment permitting Congress to reenact laws which the Court has declared unconstitutional. The effect of such an amendment would be to make Congress the final authority on the constitutionality of laws.

Persons who have felt aggrieved by the Court's decisions deny-

¹ On the question whether Congress may pass a law contrary to a decision of the Supreme Court, see H. M. Bowman, "Congress and the Supreme Court," *Polit. Sci. Quar.*, XXV, 20-34 (Mar., 1910).

² See C. G. Haines, "Political Theories of the Supreme Court from 1789-1885," *Amer. Polit. Sci. Rev.*, II, 221-244 (Feb., 1908).

³ Notable instances are the *Dred Scott* case in 1857 and the income tax case in 1895.

ing to Congress the right to enact certain legislation have been quick to point out the fact that nowhere in the constitution can any provision be found which expressly confers upon the judiciary this extraordinary and distinctive power; and from this fact some extremists have been led to assert that the framers of the constitution intentionally withheld this authority, and that, therefore, in claiming and exercising the right to veto acts of Congress, the national judiciary has "usurped" power not granted to it.¹ Much time and energy have been expended by students of American constitutional history in trying to ascertain the real intention of the framers of our fundamental law on this point. On the whole, their researches have been rather inconclusive, so far as direct historical evidence is concerned. Nevertheless, the power of our courts to declare acts of Congress unconstitutional, first judicially asserted by the Supreme Court in the case of *Marbury v. Madison*² in 1803, is now generally accepted as one of the great bulwarks of both personal and property rights against legislative, and even executive, encroachment.

CHAP.
XXIV

"Usurper
or
grantee" ?

Quite apart from such sweeping attacks as have been noted, there are people who, although unwilling to deprive the Supreme Court of the power to set aside laws, feel that much ground for criticism would be removed if the concurrence of more than a bare majority of the justices were required before laws are declared unconstitutional. Much criticism in recent years has been directed against "five-to-four," or "one-man," decisions of this sort. There are, as a matter of fact, very few such decisions—nine, in all, down to 1924.³ In several instances, however, they have overthrown laws in which vast numbers of people have, for various reasons,

"Five-to-
four"
decisions

¹ This assertion appeared in the platform of the Socialist party in 1916 and in several preceding presidential campaigns. See C. A. Beard, "The Supreme Court: Usurper or Grantee?" *Polit. Sci. Quar.*, XXVII, 1-35 (Mar., 1912), and *The Supreme Court and the Constitution* (New York, 1912). The opposing views on this subject are well set forth in H. A. Davis, "Annulment of Legislation by the Supreme Court," *Amer. Polit. Sci. Rev.*, VII, 541-587 (Nov., 1913), and in a reply to this article by F. E. Melvin, "The Judicial Bulwark of the Constitution," *ibid.*, VIII, 167-203 (May, 1914).

² For a criticism of the decision in this case, see E. S. Corwin, *The Doctrine of Judicial Review and the Constitution* (Princeton, 1914), Chap. I.

³ *Ex parte Garland*, 4 Wallace, 333 (1866); *Pollock v. Farmers Loan and Trust Co.*, 158 U. S., 601 (1895); *Fairbanks v. United States*, 181 U. S., 233 (1901); *Employer's Liability Cases*, 207 U. S., 463 (1908); *Hammer v. Dagenhart*, 247 U. S., 251 (1918); *Eisner v. Macomber*, 252 U. S., 189 (1920); *Knickerbocker Ice Co. v. Stewart*, 253 U. S., 149 (1920); *Newberry v. United States*, 256 U. S., 232 (1921); and *Adkins v. Children's Hospital*, 261 U. S., 525-571 (1923). See T. J. Norton, "What Damage Have Five-to-Four Decisions Done?," *Amer. Bar Assoc. Jour.*, IX, 721-727 (Nov., 1923); R. E. Cushman, "Constitutional Decisions by a Bare Majority of the Court," *Mich.*

been deeply interested; and it has been plausibly argued that such decisions would carry much greater weight if more than a bare majority, say two-thirds, of the judges were required to concur before setting any law aside. In pursuance of this idea several constitutional amendments have recently been introduced in Congress requiring the agreement of six or seven of the nine justices in order to declare a law unconstitutional. Perhaps, however, a constitutional amendment is not needed to bring about these desired changes; at all events, it is interesting to note that a former member of the Court has suggested and urged that the Court should itself voluntarily adopt a rule of the kind proposed.¹

Notwithstanding all the criticism that has been directed against the practice of judicial review of legislation, it seems eminently fitting that the final determination of the constitutional powers of both the executive and legislative branches of our national government should rest with the judiciary rather than with either the executive or Congress. Upon the action of each of the latter branches the constitution has placed numerous restrictions in the interest of the rights and liberties of the individual. If these authorities were permitted to measure their own powers under the constitution, especially in times of public stress, such restraints would be rendered inoperative in the very emergency which they were designed to meet. Furthermore, the judiciary is the weakest of the three branches of the national government. It controls neither the purse nor the sword. Unassisted, it is unable to attack either of the other branches, or to do serious injury to political or

Law Rev., XIX, 771-803 (June, 1921); F. R. Savidge, "Five-to-Four Supreme Court Decisions," *No. Amer. Rev.*, CCXIX, 460-473 (Apr., 1924).

The fallacy in the phrase "one man decisions" is clearly brought out in W. B. Munro, *The Government of the United States* (rev. ed.), 410-412.

¹ Former Justice John H. Clarke, in *Amer. Bar Assoc. Jour.*, IX, 689-692 (Nov., 1923). A summary of the various attacks upon the Supreme Court throughout its history and of proposed ways of curbing the Court will be found in A. H. Monroe, "The Supreme Court and the Constitution," *Amer. Polit. Sci. Rev.*, XVIII, 737-759 (Nov., 1924). Recent congressional proposals limiting the power of the Court are given in *Congressional Digest*, II, 259-287 (June, 1923). Cf. C. Warren, "Shall We Re-make the Supreme Court? The Origin of Its Powers," *Nation*, CXVIII, 526-528 (May 7, 1924); C. G. Haines, "Shall We Re-make the Supreme Court? The Practice of Other Countries," *ibid.*, 553-556 (May 14, 1924), reprinted in F. G. Crawford, *Readings in American Government*, 229-252; G. W. Alger, *The Old Law and the New Order* (Boston, 1913), Chaps. I, VI; H. Hendricks, "Some Pros and Cons of Judicial Review of Legislation," *Texas Law Rev.*, III, 134-151 (Feb., 1925); *New Republic*, XL, 110-113 (Oct. 1, 1924), "The Red Terror of Judicial Reform"; R. L. Hale, "Judicial Review versus Doctrinaire Democracy," *Amer. Bar. Assoc. Jour.*, X, 882-886 (Dec., 1924).

civil liberty. Its members are less likely to be influenced by momentary passion than are the members of Congress—perhaps than even the president. Undoubtedly it is safe to conclude that, with the judiciary possessed of this negative control over Congress and the executive, the limitations of the constitution have been more scrupulously observed and strictly enforced than would otherwise have been the case.¹ Moreover, it ought to be pointed out that the federal judiciary has made very moderate use of its power to veto acts of Congress, and even acts of state legislatures. Only a very small percentage of all the measures passed by Congress and by the several state legislatures since the foundation of the government have been nullified by the judiciary on the ground of unconstitutionality.² Since the organization of the Court nearly a hundred and forty years ago, only about fifty decisions have been rendered in which acts of Congress were declared unconstitutional; and in only about a dozen instances have these decisions evoked anything more than casual criticism.³ Finally, it is desirable to repeat that the Supreme Court never passes upon the constitutionality of either an act of Congress or an act of a state legislature unless it becomes necessary to do so in determining the rights of the parties to cases coming before the courts in the ordinary course of litigation.⁴

CHAP.
XXIVModerate
use of the
judicial
veto

Up to this point, all that has been said concerning the scope of judicial power of the United States and the system of federal courts has been in the nature of a commentary upon the third article of the constitution, which is commonly called the judiciary article; and it should be repeated that the provisions of this article constitute the real foundation of what is called the "federal judicial system." But to stop with a description of the courts which make up this federal judicial system would mean to leave unmentioned several important tribunals which, although created and organized under national authority, do not belong to what are strictly known as the federal courts as described above. In creating and organizing these special courts Congress has a very free hand, with respect to the tenure, compensation, and appointment of judges

National
courts out-
side of the
"federal
judicial
system"

¹ J. P. Hall, *Constitutional Law*, 35.

² The best analysis and tabulation of such cases is to be found in B. F. Moore, "The Supreme Court and Unconstitutional Legislation," *Columbia Univ. Studies in Hist., Econ. and Public Law*, LIV, 97-252 (1913).

³ A. H. Monroe, "The Supreme Court and the Constitution," *Amer. Polit. Sci. Rev.*, XVIII, 748 (Nov., 1924).

⁴ It should be remembered that, unlike the supreme courts in some states, the federal Supreme Court never hands down advisory opinions respecting the constitutionality of pending legislation.

and also the scope of jurisdiction and methods of procedure. Indeed, when legislating on such courts, Congress is in no way bound by any of the limitations found in the judiciary article. It may, for example, provide that the judges shall serve for only limited terms instead of during good behavior; and in several instances it has done so.

Authority
for setting
up these
courts

Whence, then, if not from the judiciary article, does Congress derive authority to create these additional national courts? The answer is that it comes not only from the general power to "constitute tribunals inferior to the Supreme Court" but more specifically from the following sources: (1) the power to regulate commerce; (2) the power to appropriate money to pay claims against the United States; (3) the power to make all needful rules and regulations for the government of the territories and dependencies, (4) the grant of exclusive authority over the District of Columbia, and (5) the power to enact legislation to render national treaties effective. A court arising from the first of these sources of authority is the Court of Customs Appeals created in 1909.¹ This tribunal, consisting of five judges appointed by the president and Senate, hears and decides appeals from rulings made by the United States Customs Court² in administering the tariff laws. In the great majority of cases its decision is final, although the Supreme Court may assume final jurisdiction in certain matters of exceptional importance. From the second source, Congress derived authority to create, in 1855, the Court of Claims.³ The five judges of this court, appointed by the president and Senate and holding office during good behavior, investigate contractual claims against the United States, brought before the court by private parties or referred to it by an executive department or Congress. In some cases their decisions are final, subject to appeal to the Supreme Court; in others, they merely report their findings to Congress or to the department concerned. Both this court and the Court of Custom Appeals are thus largely administrative courts.

¹ *U. S. Compiled Statutes* (1918), pp. 164-166; *Code of the Laws of the U. S.* (1926), pp. 901-903. The judges of this court receive salaries of \$12,500.

² This is the new name given to the board of general appraisers in 1926. The court consists of a chief justice and nine associate justices, each receiving a salary of \$10,500. *Code of the Laws of the United States* (1926), pp. 596-597, 1948.

³ *U. S. Compiled Statutes* (1918), pp. 159-164; *Code of the Laws of the U. S.* (1926), pp. 896-901, 2032-2033. The judges of the Court of Claims receive salaries of \$12,500. See J. H. Toelle, "The Court of Claims: Its Jurisdiction and Principal Decisions Bearing on International Law," *Mich. Law Rev.*, XXIV, 675-697 (May, 1926).

The express grant of power to govern territories has been the legal foundation upon which regularly organized courts have been erected in all the territories and most of the dependencies.¹ In the fourth source mentioned above, Congress finds ample authority for establishing in the District of Columbia a court of appeals, a supreme court (inferior to the former), a municipal court, a police court, and a juvenile court. Lastly, in order to give effect to treaties which confer judicial powers upon American consuls in China, Congress, in 1906, created the United States Court for China, with a special judge appointed by the president and Senate, with headquarters in Shanghai. Its main business is to pass upon appeals from decisions of the American consular courts in that country. From its own decisions appeals may be taken directly to the federal circuit court of appeals for the ninth circuit, and ultimately to the Supreme Court.²

To complete this description of the organization of the national courts, mention should be made again of the district attorneys and marshals, who, although not belonging to the federal judiciary in the strict sense, are closely connected with it and are necessary to its successful operation. These officials are appointed by the president and Senate for four-year terms, on recommendation of the attorney-general. Both a district attorney and a marshal are found in every judicial district. The district attorney presents to the grand jury any cases of violation of national laws which come to his attention; and if that body brings an indictment, it falls to him to conduct the case of the government against the accused person. His work, therefore, corresponds to that of county prosecuting officers who act under state authority; and over it the attorney-general has a somewhat indefinite supervision.³ The marshals and their deputies are charged with arresting and holding in custody persons accused of crime, summoning jurors, serving legal processes, executing the judgments of the federal courts, and protecting federal judges from personal violence when engaged in the performance of their official duties.⁴

District attorneys and marshals

¹ See Chap. xxx.

² *Code of the Laws of the U. S.* (1926), pp. 655-657. See C. S. Lobinger, "The Judicial Superintendent in China," *Illinois Law Rev.*, XII, 403-408 (Jan. 1918); W. R. Austin, "Law Courts in China," *Case and Comment*, XXIV, 956-961 (May, 1918).

³ The duties of the district attorney are more fully set forth in *U. S. Compiled Statutes* (1918), pp. 181-182; *Code of the Laws of the U. S.* (1926), pp. 915-916.

⁴ On the duties of marshals see *U. S. Compiled Statutes* (1918), pp. 182-183; *Code of the Laws of the U. S.* (1926), pp. 916-917. Cf. *In re Neagle*, 135 U. S., 1 (1890).

CHAP.
XXIV

Relation
of the
judiciary
to other
branches of
the gov-
ernment

Finally, it is necessary to note some aspects of the relations of the judiciary to the executive and legislative branches. First of all, it should be observed that the framers of the constitution, by declaring that federal judges should hold office "during good behavior," and by prohibiting Congress from diminishing their compensation while they continue in office, sought to free the judiciary from any sense of dependence upon, or undue influence by, either the executive or Congress; and in this they were completely successful, so far as the judges individually are concerned. In performing their official duties, federal judges, individually, are far more independent of outside influences than are most of the state judges, who are elected or appointed for short terms. Nevertheless, the judiciary, as a branch of the government, enjoys no such independence from the other branches as either of them enjoys with respect to the other and to the judicial branch; and the reasons are not far to seek. In the first place, the constitution itself names only one federal court, the Supreme Court, and leaves all inferior courts to be provided for, and their jurisdiction to be defined, by the joint action of Congress and the executive. Second, even in the case of the Supreme Court, Congress and the president have to coöperate in organizing it, in determining the number of judges, in fixing their compensation, and in regulating appellate jurisdiction. Third, all federal judges are appointed by the president and Senate. Finally, the assistance of the executive may become indispensable to the enforcement of the decrees or other processes issued by the courts.

Possibility
of partisan
inter-
ference

As a result of one or more of these circumstances, it is legally possible for Congress and the president to increase the number of judges in any federal court, and, by filling the new positions with judges whose views upon questions of public policy coincide with those of the president and a majority of the Senate, overcome or counteract the influence of what would otherwise be a majority of judges holding different views. Or, to take another possible instance, Congress may reduce the size of the Supreme Court, or of any other federal court, by enacting that vacancies shall not be filled until the number of judges reaches a certain diminished point. Congress may even go so far as to deprive the Supreme Court of its appellate jurisdiction over a given class of cases, as once happened during the Reconstruction period, following the Civil War, when an unfavorable decision on the constitutionality of certain

acts was anticipated. Rarely, however, if at all, has there been clear evidence of an intention on the part of either the president or Congress to "pack," or otherwise influence the decisions of, the Supreme Court. Not quite as much can be said of the inferior federal courts, over which Congress has more direct control. The Federalist Congress in 1801 created new circuit judgeships in order to have a Federalist president fill them with Federalist judges; and a few months later a Jeffersonian-Republican Congress, for equally partisan reasons, abolished the new positions.¹ Happily, however, these instances of avowedly partisan interference with the judicial system stand practically alone; at the time of the latest reorganization of the federal courts, in 1911, when the separate set of circuit courts was abolished, partisan motives were entirely absent, and the same thing was largely true when the short-lived Commerce Court was abolished, in 1913, after an existence of only two years.²

CHAP.
XXIV

In extreme cases, where enforcement of court processes is resisted by combinations too strong to be overcome by the marshals and their deputies, the federal courts are obliged to call upon the president for the aid of the armed forces. If he is unsympathetic toward the court's attitude he may refuse to act, in which event the court is helpless and its orders or decrees may be completely nullified. An instance of this sort occurred in the administration of President Jackson when the Supreme Court upheld certain claims of the Cherokee Indians, while the president sided with the Georgia authorities, who forcibly, and successfully, resisted the execution of the court's decision.³

Enforce-
ment of
court
processes

Finally, it is legally possible for Congress, from partisan motives, to attack members of the federal judiciary through impeachment proceedings charging individual judges with treason, bribery, or "other high crimes and misdemeanors," as occurred in the impeachment of Judges Pickering and Chase during the presidency of Jefferson. Impeachment is the only method prescribed in the constitution for the removal of judges who become unfit for judicial office for any reason whatsoever, including physical, mental,

Impeach-
ment of
judges

¹ M. Farrand, "The Judiciary Act of 1801," *Amer. Hist. Rev.*, V, 682-686 (July, 1900); W. S. Carpenter, "Repeal of the Judiciary Act of 1801," *Amer. Polit. Sci. Rev.*, IX, 519-528 (Aug., 1915).

² J. A. Fowler, "The Commerce Court," *No. Amer. Rev.*, CXCVII, 464-476 (Apr., 1913). See also *Harvard Law Rev.*, XXXIX, 594-615 (Mar., 1926).

³ This incident arose in connection with the cases of *The Cherokee Nation v. Georgia*, 5 Peters, 1 (1831), and *Worcester v. Georgia*, 6 Peters, 515 (1832).

or moral defects.¹ It has been resorted to, in all, in only a half-dozen instances,² and has resulted in conviction and removal in only three. A few judges of inferior federal courts have resigned when impeachment proceedings seemed imminent. But in all of this, partisan considerations have played little or no part, except in the two impeachment cases mentioned.

REFERENCES

The Federalist, Nos. LXXVIII-LXXXIII.

J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chaps. XXII-XXIV.

S. E. Baldwin, *The American Judiciary* (New York, 1905), Chaps. III-VII, IX-X.

C. K. Burdick, *The Law of the American Constitution* (New York, 1922), Chap. v.

W. W. Willoughby, *Constitutional Law of the United States* (New York, 1910) II, Chaps. L-LV.

A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), I, 508-516; 614-616; II, 259-260; 315-317; III, 461-462.

F. N. Judson, *The Judiciary and the People* (New Haven, 1913), Chaps. II-III.

C. Warren, *The Supreme Court in United States History*, 3 vols. (Boston, 1923).

———, *Congress, the Constitution, and the Supreme Court* (Boston, 1925).

F. Frankfurter and J. M. Landis, *The Business of the Supreme Court* (New York, 1927). This first appeared as a series of articles in the *Harvard Law Rev.*, XXXVIII-XL (June, 1925—June, 1927).

H. L. Carson, *The Supreme Court of the United States: its History and its Centennial Celebration, February 4, 1890* (Philadelphia, 1891).

C. A. Beard, *The Supreme Court and the Constitution* (New York, 1912).

W. M. Meigs, *Relation of the Judiciary to the Constitution* (New York, 1920).

B. Coxe, *Judicial Power and Unconstitutional Legislation* (Philadelphia, 1893).

H. A. Smith, *The American Supreme Court as an International Tribunal* (New York, 1920).

C. G. Haines, *American Doctrine of Judicial Supremacy* (New York, 1914);

———, "Histories of the Supreme Court of the United States Written from the Federalist Point of View," *Southwestern Polit. Sci. Quar.*, IV, 1-35 (June, 1923).

¹By act of Congress, federal judges who have served ten years continuously may, upon reaching the age of seventy, retire upon full salary. *Code of the Laws of the U. S.* (1926), p. 908.

²The successful impeachment proceedings were those against John Pickering, 1803-04; West H. Humphreys, 1862; and Robert W. Archbald, 1912-13. The unsuccessful cases were those against Samuel Chase, 1804-05; James H. Peck, 1830-31; and Charles Swayne, 1904-05. In April, 1926, the House of Representatives, by a vote of 306 to 62, adopted articles of impeachment against George W. English, judge of the district court for the Eastern District of Illinois; but on the eve of the trial Judge English resigned, and the impeachment proceedings were discontinued. See *Literary Digest*, LXXXIX, 5-7 (April 17, 1926). For additional references on federal impeachment cases, see p. 459.

- C. W. Bunn, *Jurisdiction and Practice of the Courts of the United States* (3rd ed., St. Paul, 1927).
- M. Finkelstein, "Judicial Self-Limitation," *Harvard Law Rev.*, XXXVII, 338-364 (Jan., 1924), XXXIX, 221-244 (Dec., 1925). On the attitude of courts toward "political questions."
- M. F. Weston, "Political Questions," *Harvard Law Rev.*, XXXVIII, 296-333 (Jan., 1925).
- H. W. Bickl , "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action," *Harvard Law Rev.*, XXXVIII, 6-27 (Nov., 1924).
- J. H. Ralston, "Judicial Control over Legislatures As to Constitutional Questions," *Amer. Law Rev.*, LIV, 1-38 (Jan.-Feb., 1920), 193-230 (Mar.-Apr., 1920).
- Extracts from the Journal of the U. S. Senate in All Cases of Impeachment, . . . 1798-1904*, 62nd Cong., 2nd Sess., Sen. Doc. 876 (1912).
- The Constitution of the United States of America as Amended to December 1, 1924*, 68th Cong., 1st Sess., Sen. Doc. 154 (1924), 4055-489.
- Students who do not have access to a law library will find convenient summaries of recent Supreme Court decisions for 1911-1914 in *Amer. Polit. Sci. Rev.*, IX, 36-49 (Feb., 1915); for 1914-1917 in *ibid.*, XII, 17-48 (Feb., 1918); 427-457 (Aug., 1918); 640-666 (Nov., 1918); for 1917-1918, *ibid.*, XIII, 47-77 (Feb., 1919); for 1918-1919, *ibid.*, 607-633 (Nov., 1919); for 1919-1920, *ibid.*, XIV, 635-658 (Nov., 1920); XV, 52-70 (Feb., 1921); *Polit. Sci. Quar.*, XXXV, 411-439 (Sept., 1920); for 1920-1921, *Amer. Polit. Sci. Rev.*, XVI, 22-40 (Feb., 1922), 228-244 (May, 1922), for 1921-1922, *Polit. Sci. Quar.*, XXXVII, 486-513 (Sept., 1922); for 1922-1924, *ibid.*, XL, Suppl. 71-79 (Mar., 1925); XL, 101-126 (Mar., 1925); XL, 404-437 (Sept., 1925); for 1923-1924, *Amer. Polit. Sci. Rev.*, XIX, 51-68 (Feb., 1925); for 1924-1925, *ibid.*, XX, 80-106 (Feb., 1926); for 1925-1926, *ibid.*, XXI, 71-94 (Feb., 1927); *Amer. Year Book* (1926), 158-163; for 1926-1927, *Amer. Polit. Sci. Rev.*, XXII, 70-107 (Feb., 1928).

CHAPTER XXV

THE POWERS OF CONGRESS: GENERAL VIEW

A prevalent misconception

"No misconception in respect to the organization of the state and of the functions of the various parts of its governmental machinery," says an American political scientist, "is more prevalent than that the national assembly—the parliament, the congress, the legislative chambers, as the case may be—is simply, or primarily, a body for the formulation and passage of general laws for the determination of the rights and duties of the citizen body for which it acts. The enactment of public laws of this character is undoubtedly one of its functions, and it need scarcely be said, an exceedingly important one. That this is not its sole function, indeed is not the one making the largest draft upon its time, is at once apparent if an attempt is made to analyze the work really done by it."¹

Functions of Congress

This statement is no less true of the Congress of the United States than of the legislature of Pennsylvania or Ohio, on the one hand, or the Parliament of Great Britain, France, or Germany, on the other. Congress is, indeed, a law-making body; but it is far more than that. Its readily distinguishable functions (exercised by one house or both) are at least six in number: (1) constituent, (2) electoral, (3) executive, (4) judicial, (5) supervisory and directive, and (6) legislative—an enumeration which of itself is sufficient to indicate that Congress, like the presidency, although established with a view to a separation of powers, deviates from that principle in its actual powers and workings at almost every turn.

1. Constituent

Some of the functions named above have been sufficiently considered in earlier portions of this book, and are but mentioned here in order that the actual range and diversity of congressional activities may not be lost to view. In describing the modes by which the national constitution is amended, we saw that, while Congress cannot itself under any circumstances make a change in the fundamental written law, no alteration thereof can be brought about without congressional action. Congress prescribes whether pro-

¹ W. F. Willoughby, "The Correlation of the Organization of Congress with that of the Executive," *Amer. Polit. Sci. Rev.*, Suppl., VIII, 155 (Feb., 1914).

posed amendments shall be ratified in the states by the legislatures or by conventions; it may call a national convention to formulate amendments on application of the legislatures of two-thirds of the states; in point of actual practice, it first adopts all proposed amendments and then puts them before the states for action.¹ In considering the mode of electing the president and vice-president we have seen that Congress acts as a board to canvass the electoral vote and declare the results, and that in event of the failure of an electoral majority the House of Representatives chooses the president from the three candidates having the largest number of votes, and the Senate similarly chooses the vice-president from the two candidates standing highest.² We have seen that, while the Senate did not develop into a general executive council on the lines at one time anticipated by Washington, it shares with the president, by express constitutional provisions, the executive functions of appointment and treaty-making.³

CHAP.
XXV2. Elec-
toral3. Execu-
tive

Three of the six functions enumerated above remain, namely: judicial,⁴ supervisory and directive, and legislative; and a brief general survey of these may properly be taken before we proceed to consider in more detail, in succeeding chapters, certain selected congressional powers of exceptional importance and complexity.

The constitution endowed the president and Senate with extensive powers of appointment. But how was an unfit officer to be got rid of if he could not be induced to resign? We know now that the power to appoint came to be construed to involve the power to remove. But this development could not definitely be foreseen by the constitution's makers; besides, the president or other appointing officer might be lax about making desirable removals. The judges were to hold office during good behavior. But how could they be severed from their positions if their behavior ceased to be good? How should the president himself, in case of remissness, be made to turn over his office to a successor?

4. Judicial

The answer lay ready at hand in the historic English device of impeachment. To be sure, the growth of cabinet responsibility was already making impeachment unnecessary in the mother country; and the practice there is now obsolete. But the makers of our constitution saw no better mode of protection against abuse of power or other serious official misconduct. Hence they wrote into the

Impeach-
ment: the
constitu-
tional
provision¹See pp. 179-180.²See pp. 227-230.³See pp. 237-242, 248-249.⁴M. V. Voorhies, "Judicial Functions and Powers of Congress," *Va. Law Rev.*, XIII, 632-641 (June, 1927).

document the provision that "the president, vice-president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."¹ Provisions for the impeachment of state officers likewise early found their way into most state constitutions.

Who can be
impeached

Under the clause cited, only civil officers are subject to impeachment; military and naval officers are liable to trial by court-martial, but cannot be impeached. Members of Congress, furthermore, although civil officers, are commonly considered to be exempt;² there is some warrant, indeed, for regarding them as state officers rather than as federal officers. The grounds for impeachment are stipulated as clearly, perhaps, as is possible. Bribery is self-explanatory, and treason is defined by the constitution.³ "High crimes and misdemeanors" is a flexible phrase, but one which has uniformly been construed to include only offenses of a grave nature involving something more than mere inefficiency or partisanship.

Impeach-
ment
procedure

The process of impeachment can be stated briefly. It starts in the House of Representatives, where, upon charges being made against a given official, a committee is appointed to investigate. The committee reports to the House, and if, upon consideration of the findings, the majority so votes, the charges, in the form of "articles of impeachment," are sent to the Senate and a committee of "managers" is designated to conduct the trial. The Senate has no option but to hear the case. It furnishes the accused with a copy of the charges against him, fixes the date for the trial to begin, and when the time arrives converts itself into a court, under the chairmanship of its regular presiding officer, unless the president of the United States is on trial, in which case the chair is occupied by the chief justice of the Supreme Court. The accused is allowed counsel, and he may appear and give testimony in person; and witnesses, for and against him, are brought in and questioned. At the close of the proceedings, which may last through many weeks, the public is excluded and the Senate votes. Two-thirds convicts; anything less acquits. The penalty, in case of conviction, is removal from office, to which may be added disqualification for ever holding "any office of honor, trust, or profit under the United States;" and the president's power of pardon and reprieve does not apply. Once

¹ Art. II, § 4.

² The unsuccessful impeachment of Senator William Blount of Tennessee, in 1798, is the only case involving a member of Congress.

³ Art. III, § 3, cl. 1.

retired to private life, furthermore, the convicted person may be proceeded against in the ordinary courts like any other person if he has committed an indictable offense.

CHAP.
XXV

In the entire history of the country impeachment proceedings have been brought against only ten federal officers, and only three have been convicted. On charges arising mainly out of alleged violations of the Tenure of Office Act passed over a veto in 1867, President Johnson came within one vote of being convicted in 1868. But the effort failed, as did the impeachment of William W. Belknap, secretary of war, in 1876. As we have seen, all of the three officers convicted belonged to the judiciary. Two of them were district judges; one, tried in 1913, was a judge of the now defunct Commerce Court.¹

Past im-
peachment
cases

It has not been customary among writers, and certainly not in Congress, to consider the two functions that remain to be spoken of—(a) administrative supervision and direction and (b) legislation—as entirely separate; and the distinction cannot, without indulging in a species of pedantry, be carried consistently through the account of congressional activities which follows. Nevertheless, there is a difference which ought to be noted; it is intrinsically important, and more will undoubtedly be made of it in the future than in the past. “Examination of the work of any legislative body,” remarks Dr. Willoughby, “reveals the fact that the great bulk of its activities has to do with such matters as the determination, subject to constitutional limitations, of how the government, and particularly the administrative branch of the government, shall be organized, what work shall be undertaken, how such work shall be performed, what sums of money shall be applied to such purposes and how this money shall be raised and disbursed. From this standpoint the legislature is the board of directors of the public corporation. Representing and acting for the citizen stockholders, it is its function to give orders to administrative officers; and, as a correlative and necessary function, to take such action as will enable it at all times to exercise a rigid supervision and control over

5. Super-
visory and
directive

¹R. Foster, *Commentaries on the Constitution of the United States* (Boston, 1895), 505-632; D. S. Alexander, *History and Procedure of the House of Representatives*, Chap. xvii; D. Y. Thomas, “The Law of Impeachment in the United States,” *Amer. Polit. Sci. Rev.*, II, 378-395 (May, 1908); A. Simpson, *A Treatise on Federal Impeachments* (N. Y., 1917); *Extracts from the Journal of the United States Senate in All Cases of Impeachment . . . 1798-1904*, 62nd Cong., 2nd Sess., Sen. Doc. No. 876 (1912); *Proceedings in the Trial of Impeachment of Robert W. Archbald*, 62nd Cong., 3rd Sess., Sen. Doc., No. 1140 (1913); R. W. Carrington, “The Impeachment Trial of Samuel Chase,” *Va. Law Rev.*, IX, 485-500 (May, 1923).

the latter with a view to seeing that its orders are properly and efficiently carried out. Manifestly this function is quite distinct from that of acting as a law-making body, strictly speaking. It is unfortunate that the same designation, 'laws' or 'statutes,' is given to both classes of documents through which the action is set forth. Laws, from the juristic standpoint, have to do with the formulation and enactment of general rules of conduct to govern the relations between individuals and between individuals and the government. They have to do with rights and duties and the means of their enforcement. They are intended to be general and permanent. Enactments for the purpose of giving directions to officers of the government are for the most part but administrative orders. The major part of them have only a temporary end in view."¹

When Congress passes a measure regulating commerce among the states, or extending citizenship to the inhabitants of Porto Rico, or forbidding paupers to be admitted to the country, or prescribing punishments for counterfeiting the securities or current coin of the United States, it is making laws, in the proper sense of the term. When it authorizes the construction of a bridge or a public building, provides for the organization or reorganization of executive departments, establishes a consulate at Aden, appropriates money for a national bureau of efficiency, or prescribes how immigrants shall be inspected, it is really only making rules or arrangements of a business or administrative character. And the point to be impressed is that it is this latter sort of thing that absorbs the major part of the time and energy of the two houses.

To a remarkable extent—to a far greater extent, as has been pointed out, than the English Parliament—Congress concerns itself with the organization, procedure, and activities of the executive and administrative organs and agencies of the government, creating and abolishing offices, starting new lines of activity, allotting funds to departments and enterprises, receiving reports, making investigations,² issuing rules, criticizing and admonishing—in short, "running the government," very much, indeed, as a board of directors runs a great business organization. In performing this function the two houses use the same machinery and act in the

¹ *Government of Modern States*, 301-302.

² J. M. Landis, "Constitutional Limitations on the Congressional Power of Investigation," *Harvard Law Rev.*, XL, 153-221 (Dec., 1926); H. L. McBain, "Congressional Inquiries and the Constitution," *N. Y. Times*, Mar. 11, 1928. For other references on the investigative function of Congress, see p. 277 above.

same way as in making laws. But the nature of the work performed is different in the two cases, and something would be gained if the rules of organization and procedure were shaped in accordance with this fact; although one is obliged to add that a change in this direction is hardly to be expected.

CHAP.
XXV

Without attempting to hold rigidly to the foregoing narrow and exact definition of the legislative function, we may now turn to consider the status which Congress occupies in our system as a law-making body; after all, Congress is primarily a legislature. The first thing to be observed is that whatever law-making power the national government possesses belongs to Congress: "all legislative power herein granted," says the constitution, "shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."¹ Not only is all national law-making authority thus conferred on Congress, but that body cannot, under the wording of this provision, delegate its essential legislative authority to the president or to any other branch or organ of the government. This does not mean, however, that it may not authorize the president to decide when a certain law shall go into effect, or that it may not establish by law some general rule or principle and then empower the president or some administrative board to apply the rule to special cases as they arise.² Some problems, like those connected with the fixing of freight and passenger rates in interstate commerce, are so complicated that Congress long ago gave up the attempt to solve them by exact and detailed legislation. In the instance mentioned, for example, it was prescribed that all rates should be reasonable, and an expert body, the Interstate Commerce Commission,³ was created to which was assigned the duty of determining the reasonableness or unreasonableness of rates in specific cases. For similar reasons, power to apply other general laws has been conferred upon the Federal Trade Commission and various other administrative bodies.⁴ The inability of Congress to delegate its strictly legislative powers would seem to render of doubtful constitutionality, if not totally invalid, any congressional action authorizing a nation-wide referendum as a means of determining acceptance or rejection of a measure. Without a consti-

6. Legis-
lative

¹ Art. I, § 1, cl. 1.

² And, of course, it does not prevent the president from *participating* in the work of legislation as described in Chap. XVII.

³ See pp. 537-541.

⁴ See p. 544. Cf. C. K. Burdick, *The Law of the American Constitution*, 149-154.

CHAP.
XXVRestricted
scope of
congres-
sional
power

tutional amendment, Congress cannot, it is believed, delegate its legislative power even to the whole people.

In the second place, it is to be observed that Congress does not have full and unrestricted legislative power, like the English Parliament, but only "all legislative power *herein granted*"; in other words, every exercise of legislative power by Congress must be based upon some authorization in the constitution. When, therefore, certain legislation is proposed or demanded, its advocates must be able to point to some clause of the constitution which, either expressly or by fair implication, grants the necessary authority. On the other hand, if the opposition can show that there is no constitutional sanction, it will be useless for Congress to enact the proposed measure; for the Supreme Court, which is the final judge of congressional powers, will be practically certain to find that Congress has exceeded its authority, and that, accordingly, the supposed statute is void. This restricted scope of congressional power easily explains why debates on the constitutionality of proposed laws occupy so much time and attract such wide attention in connection with congressional proceedings.

Express
grants

The situation, in a nutshell, regarding congressional legislative power is that (a) such power is defined positively by numerous express grants, (b) it is defined negatively by almost equally numerous express prohibitions, and (c) between these two fields lies a broad, ill-defined, contentious domain of implied and resulting powers. Upon many matters there can be no question as to congressional power, because power has been conferred in definite and unmistakable terms. This is true of a long list of subjects enumerated in the eighth section of Article I, including currency, patents, copyrights, bankruptcy, taxation, naturalization, the regulation of foreign and interstate commerce, declaring war, and maintaining an army and navy.

✓ Permissive
and man-
datory
powers

Most of the powers expressly conferred upon Congress are permissive; that is to say, the two houses are perfectly free to exercise or to refrain from exercising them, in whole or in part. There are, however, some grants of power which are mandatory. For example, it is made the duty of Congress to call a convention of the states to revise the constitution whenever the legislatures of two-thirds of the states so request;¹ likewise to provide for taking the census every ten years,² and to make regulations for the carrying of appeals from the lower courts to the Supreme Court.³ In none of these

¹ Art. V.² Art. I, § 2, cl. 3.³ Art. III, § 2, cl. 2.

instances, however, is there any way in which Congress can be compelled to act if it fails to obey the constitutional injunction; neither the executive nor the judiciary has means of forcing the legislature to exercise a mandate of the constitution.¹ The sole remedy for dereliction lies with the electorate and consists in choosing congressional majorities which will observe the constitution's requirements.²

CHAP.
XXV

On the other hand, not only are the powers of Congress limited in a general way by the federal nature of our government, but the framers of the constitution took pains to include in the instrument a number of express restrictions on congressional legislative activity. Most of these restraints are enumerated in the ninth section of Article I, where one finds that the privilege of the writ of habeas corpus may be suspended only when the public safety requires it in time of rebellion or invasion; that no bill of attainder or ex post facto law may be passed; that no preference may be given through commercial regulations or revenue laws to the ports of one state over those of another; that vessels bound to or from one state shall not be obliged to take out clearance papers or pay duties in another; that money may be drawn from the public treasury only after appropriations thereof have been made by law; and that no titles of nobility may be granted.

Express
prohibi-
tions

Further limitations are found in other parts of the constitution. Thus Congress may alter the regulations prescribed by law in each state respecting the times, places, and manner of holding elections for senators and representatives "*except as to the places of choosing senators.*"³ Again, although the power of taxation given to the national government is very comprehensive, there are certain express and implied limitations upon its exercise. Thus when direct taxes (except income taxes) are laid, they must be apportioned among the several states on the basis of their respective populations;⁴ when indirect taxes, such as duties, imposts, and excises, are laid, they must be assessed upon a basis of uniformity, that is, at a uniform rate upon each unit of the thing taxed throughout the United States;⁵ no tax whatever may be laid upon articles exported from any state;⁶ and, under the implied limitations upon

Other
limitations

¹ W. W. Willoughby, *Constitutional Law of the United States*, I, 573-574.

² It may be noted in this connection that Congress, like other legislative bodies, can pass no irrepealable act. Any measure put on the statute-book by one Congress is legally subject to removal therefrom, or to any amount of amendment, by any subsequent Congress. See T. M. Cooley, *Principles of Constitutional Law* (2nd ed.), 100-102.

³ Art. I, § 4, cl. 1.

⁵ Art. I, § 8, cl. 1.

⁴ Art. I, § 9, cl. 4.

⁶ Art. I, § 9, cl. 5.

the taxing power growing out of the federal nature of our government, Congress may not tax the essential governmental agencies of a state, including the salaries of state officials, steps in state judicial proceedings, and the property or borrowing power of a state or municipality.¹ Furthermore, in providing for the support of the army, Congress may not make appropriations from the national treasury for a longer period than two years.² By inserting in the constitution a definition of the crime of treason, the framers effectually prevented the legislative branch from extending the list of offenses which may be prosecuted as treason; and in declaring what shall be the punishment for treason Congress is further restricted by the provision that "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."³

Bases of
implied
powers

Where there are express grants or express prohibitions or restrictions, the authority of Congress to legislate, or its lack of power to do so, is usually sufficiently clear. On many subjects, however, the authority, if possessed at all, must be derived by implication or inference from some of the powers which are granted in express terms. That legislative power may legitimately be derived in this manner, the constitution itself practically asserts in the "implied powers" clause, which gives Congress authority to "make all laws which shall be necessary and proper for carrying into execution" the powers expressly vested by the constitution in Congress or in any branch of the government.⁴ Likewise, four of the last seven amendments expressly state that Congress shall have power to enforce them by "appropriate legislation."

Liberal
interpreta-
tion of
congres-
sional
powers

It is the sharp differences of opinion over what measures may and what ones may not fairly be deemed "necessary and proper," or "appropriate" for carrying into effect the enumerated powers of the national government, that has made the powers of Congress "the great battle-ground of the constitution." "Around them have surged the legal combats of strict and broad construction, of tariff and taxation, of nullification, of secession, of the currency, and finally, of commercial regulation and corporation control."⁵ The Supreme Court early adopted a very liberal interpretation of these phrases, to this general effect: if it can be shown that Congress has been given authority to deal with any specified subject, in exer-

¹ W. W. Willoughby, *Constitutional Law of the United States*, I, 110-119.

² Art. I, § 8, cl. 12.

³ Art. III, § 3, cls. 1-2.

⁴ Art. I, § 8, cl. 18.

⁵ J. T. Young, *The American Government and its Work* (rev. ed.), 132.

cising that authority Congress is free to select any means or instrumentalities whatsoever which are not prohibited by the constitution and are appropriate and which are consistent with the letter and spirit of that instrument.¹ Furthermore, whether a given law is "necessary," within the meaning of the constitution, is a question for Congress alone to decide; the courts will not inquire into the degree of the alleged necessity. Illustrations of laws passed under implied grants of legislative power include the acts which established a Bank of the United States in 1791 and in 1816, and created the national banking system during the Civil War; the laws authorizing the issuance of "greenbacks" and making them legal tender in the payment of debts, and, more recently, the act creating the federal reserve system; acts establishing the postal savings and parcel-post systems; and the great variety of measures based on authority implied from the power to regulate foreign and interstate commerce, *e.g.*, acts fixing the rates and regulating the services of express, telegraph, telephone, and pipe-line companies, acts concerning safety appliances and workmen's compensation, and the pure food and drugs act.

Moreover, the scope of congressional authority has been considerably widened by decisions of the Supreme Court which have held that it is not necessary for Congress to trace back every one of its powers to some single grant of authority, direct or implied, but that authority may be deduced from more than one of the specified powers or from some or all of them combined.² Powers derived in this way are commonly called "resulting powers." The criminal code of the United States is a good illustration: the constitution gives the national government express power to punish only five crimes, *i.e.*, counterfeiting the securities and coin of the United States, felonies committed (a) in the territories or (b) on the high seas, offenses against the law of nations, and treason; but Congress unquestionably has the power to punish the violation of any national law and to protect prisoners in its custody, although such powers are neither expressly granted nor inferable from any single express grant in the constitution. Similarly, from the premise that in all matters pertaining to international relations the United States appears as a single sovereign state, and upon it rests the duty of meeting all its international responsibilities, has been

Resulting
powers

¹ *McCulloch v. Maryland*, 4 Wheaton, 316 (1819). Cf. pp. 128-130 above.

² *Cohens v. Virginia*, 6 Wheaton, 264 (1821); W. W. Willoughby, *Constitutional Law of the United States*, I, 64-66.

deduced the power of Congress to punish the counterfeiting in this country of the securities of foreign states, to annex by statute unoccupied territory, and to establish judicial tribunals in foreign lands.

In recent years the phrase "federal police power" has come into common use, and it calls, in this connection, for brief explanation. The police power has been defined as the power to restrict the rights of liberty and property in the interest of the public health, safety, morals, or general welfare. No such general police power is conferred upon Congress in the constitution, and the most common instances of its exercise are found in state legislation and municipal ordinances. Such police powers as Congress may be said to have are legally only special or peculiar forms of the exercise of some express or implied power, in which the protection of the public health, morals, safety, or general welfare is prominently involved. These "police powers" arise, as a rule, from the power to lay taxes, to establish post-offices and post-roads, or to regulate interstate commerce. Illustrations of powers springing from the last-mentioned source are the safety-appliance act, the employer's liability act, the law limiting the hours of labor of persons employed on interstate carriers, the meat inspection and pure food and drugs laws, the narcotics control act, the statute prohibiting the transportation of lottery tickets by interstate carriers, and the Mann white-slave act.¹

The mere fact that Congress has been invested with authority to legislate upon a given subject does not necessarily mean that the states are thereby deprived of the right to legislate upon the same subject. Naturally, in all cases where the power has been expressly prohibited to the states in the constitution, as, for example, the coining of money and the laying of duties on imports,² Congress alone may legislate, and in such cases its power is said to be exclusive. Congress likewise has exclusive power in cases in which, from the nature of the power or from the nature of the subject to which the power relates, legislative power must necessarily be exercised by the national government; for example, naturalization and the regulation of foreign and interstate commerce.³ But in practically all cases which do not fall within these two classes, Con-

¹ W. W. Willoughby, *Constitutional Law of the United States*, II, 735-745; C. K. Burdick, *The Law of the American Constitution*, 225-233; R. E. Cushman, *Studies in the Police Power of the National Government* (Minneapolis, 1920).

² Art. I, § 10, cls. 1-3.

³ Willoughby, *op. cit.*, I, 73-77, 543-550.

gress and the state legislatures are said to have concurrent or independent power; so that acts of Congress and state statutes relating to the same subject may be in full force at the same time. Thus there may be both national and state management or supervision of congressional elections; and both Congress and the states may exercise the right to lay taxes upon the same property or incomes. A state law which is repugnant to the national law upon the same subject will, of course, have to yield to the latter. The phrase "concurrent power" is also used to denote certain powers which may be exercised by a state until Congress legislates on the subject. On bankruptcy, for example, each state is at liberty to pass its own laws, and these measures remain in full force and effect until Congress exercises its right to legislate on that subject. When Congress acts, the state laws are suspended; although the mere repeal of the congressional statute would automatically revive them unless they had been repealed in the meantime by the state legislature.¹

CHAP.
XXV

While it is true that the national government in general, and Congress in particular, has only limited and enumerated powers, in time of war these powers have shown such astonishing capacity for expansion that grave doubts have arisen as to where national authority really begins and where it ends. Some people have even gone so far as to contend that in war time the constitutional limitations upon this authority are partially or entirely suspended. It will be well, therefore, to take some notice of these remarkable and far-reaching "war powers" at this point.

War
powers:

The defect of the government under the Articles of Confederation which came nearest to proving fatal was its inability to mobilize the full fighting strength and material resources of the country in prosecuting the final stages of the Revolutionary War. On several occasions, too, Congress found itself without authority, or the courage to assume authority, to use the national military forces to suppress internal disorders and insurrections.² This experience serves to explain why the preamble of our present constitution states that two of the principal objects sought in the adoption of the new instrument in 1787 were to "insure domestic tranquillity," and to "provide for the common defense." To secure these ends, very important and far-reaching powers were conferred, not only upon the president in his capacity as commander-in-chief

¹ See pp. 549-550.² J. Fiske, *The Critical Period*, 147-153, 177-186.

of the army and navy,¹ but also upon Congress as the law-making, taxing, and appropriating organ of the national government.

Recent events connected with our participation in the World War have shown that there is practically no power over the lives and property of citizens, deemed necessary for the successful conduct of war, which has not been construed to be granted by the constitution, either in express terms or by implication. "The farmer's wheat, the housewife's sugar, coal at the mines, labor in the factories, ships at the wharves and on the high seas, trade with friendly countries, the vast national railway system, the banks and stores, private riches, lands and houses, all were mobilized and laid under whatever obligations the requirements of waging war made imperative. Never before were labor and capital, land and natural resources, so completely subjected to governmental authority in a common enterprise." In brief, the powers of Congress with respect to the national defense were demonstrated to be practically unlimited, except by the provision that the president shall be commander-in-chief, and that appropriations for the army shall not be made for a longer period than two years.

1. Declaration of war

The constitutional provisions which made possible this remarkable and unprecedented exercise of the "war powers" of Congress can be indicated briefly. First, to Congress is given the right to "declare war."² In practice, this grant has been of less importance than was expected, because the president, by his conduct of foreign relations, may create a situation from which the nation cannot withdraw with honor or without serious loss of prestige; in such cases Congress has little or no choice but to declare war.³ Formal declarations of war, in the sense of announcing that hostilities will be begun, have been almost wholly lacking in our history. In most instances, the declaration has amounted to nothing more than the formal announcement that a state of war already existed. Such a declaration, however, has its value from a strictly legal point of view, in that it fixes the exact date from which the rights and liabilities incident to a state of war are to be reckoned. Whether this grant of authority to declare war carries with it, as a corollary, the right of Congress to declare the end of a state

¹ See pp. 251-254 above, and F. R. Black, "The Theory of the War Power under the Constitution," *Amer. Law Rev.*, LX, 31-66 (Jan.-Feb., 1926).

² Art. I, § 8, cl. 11. This clause also grants authority to issue letters of marque and reprisal, which, however, has been of no practical importance since the disappearance of privateering.

³ See pp. 251-252.

of war and the resumption of peaceful relations, was warmly and exhaustively debated in the sessions of Congress held in 1920 and 1921. Finally, more than two years after the signing of the armistice which marked the actual cessation of hostilities, a joint resolution was passed in July, 1921, declaring the war with the central European powers to be at an end.¹

CHAP.
XXV

From the power to "raise and support armies" and to "provide and maintain a navy,"² supplemented by its authority over commerce and the power to tax, borrow, and appropriate, and by its direct and indirect control over the administrative agencies charged with the detailed conduct of war, Congress derives its authority to take whatever steps may be necessary to safeguard the nation in time of peace and to ensure the vigorous and effective carrying on of hostilities in time of war. Of the necessity and appropriateness of the means thus employed, Congress is practically the sole judge, being responsible for the proper exercise of these great powers primarily to the electorate rather than to the courts. There is even uncertainty as to just how far the guarantees of civil liberty, particularly freedom of speech and press, contained in the first ten amendments, impose restraints upon Congress in the exercise of its comprehensive war powers—at all events, restraints which can be enforced in the courts.³

2. Pro-
vision and
main-
tenance of
military
and naval
estab-
lish-
ments

During the World War the war powers of Congress were successfully invoked to justify the enactment of two important classes of emergency laws.⁴ One class of measures looked to the mobilization of all the human and natural resources of the country; the other class had for its object the prevention of interference with the conduct of the war. In the first group belong the selective draft acts of 1917 and 1918; a number of measures designed to protect the health and morals of the enlisted men; the civil relief acts,

Emergency
laws,
1917-18

¹ For full consideration of this matter see J. M. Mathews, *Conduct of American Foreign Relations*, 328-336; E. S. Corwin, "The Power of Congress to Declare Peace," *Mich. Law Rev.*, XVIII, 669-675 (May, 1920).

² Art. I, § 8, cls. 11-12.

³ *Schenck v. U. S.*, 249 U. S., 47 (1919); *Abrams v. U. S.*, 250 U. S., 616 (1919); *Schaefer v. U. S.*, 251 U. S., 466 (1920); *Pierce v. U. S.*, 252 U. S., 239 (1920). In *U. S. v. Cohens Grocery Co.*, 255 U. S., 81 (1920), the Supreme Court held that the amended food control act was in conflict with the Fifth Amendment, and, in so holding, clearly stated that the guarantees and limitations of the Fifth and Sixth Amendments were not suspended or changed by the mere existence of a state of war. See T. F. Carroll, "Freedom of Speech and of the Press During the Civil War," *Va. Law Rev.*, IX, 516-551 (May, 1923).

⁴ All of the laws mentioned in this paragraph are in *U. S. Compiled Statutes* (1918), pp. 427-465, 1681-1686.

intended to prevent prejudice to the civil rights of persons in military service; the war-risks insurance act for the welfare of families of soldiers and sailors who died or were wounded in the service; laws stimulating the production of ships, munitions, food, and fuel; laws authorizing the president to take over and operate the great railway systems of the country; statutes creating a long list of boards and commissions charged with the supervision of essential industries and activities, or with the administration of some of the enactments just mentioned; and acts providing for the reorganization of the administrative departments of the government so as to increase their efficiency. In the second group of measures, which had for their purpose the prevention of interference with the conduct of the war, are found, notably, the espionage act of June, 1917, and its supplement, the sedition act of May, 1918. These laws imposed restrictions upon freedom of speech and the press which, in the opinion of many able lawyers, were unconstitutional invasions of the sphere of liberty supposed to be reserved and safeguarded by the national bill of rights.¹ Other measures coming within this general class were the trading-with-the-enemy act of 1917 and the war-materials-destruction, or sabotage, act of April, 1918.

3. Military
and naval
regulations

Congress has been given authority to prescribe "rules for the government and regulation of the land and naval forces"² and "rules concerning captures on land and water."³ The rules which have thus been enacted for the army are called the "Articles of War,"⁴ and those for the navy, the "Articles for the Government of the Navy";⁵ together, the two are known as the "Military Laws of the United States." They comprise the rules by which the respective powers and duties of officers and men in the military and naval service are determined and exercised, including the regulations governing the trial and punishment of infractions of military discipline and procedure of courts-martial in both the army and the navy. Courts of inquiry have also been provided for, in both the army and the navy, to investigate and report facts in cases referred to them; but, unless they have been specially required

¹ Z. Chafee, *Freedom of Speech* (New York, 1920); C. H. Hough, "Law in War Time—1917," *Harvard Law Rev.*, XXXI, 692-701 (Mar., 1918).

² Art. I, § 8, cl. 14.

³ Art. I, § 8, cl. 11.

⁴ *U. S. Compiled Statutes* (1918), pp. 315-328; *ibid.* (1923), pp. 112-128; *Code of the Laws of the U. S.* (1926), pp. 227-241.

⁵ *U. S. Compiled Statutes* (1918), pp. 388-396; *Code of the Laws of the U. S.* (1926), pp. 1154-1163.

to do so, they are not permitted to express opinions as to the merits of the cases, or to make recommendations.¹

Because of its inclusion in the article of the constitution which sets forth the organization and powers of Congress, lawyers have argued that Congress alone has the right to suspend the privilege of the writ of habeas corpus "when in cases of rebellion or invasion the public safety may require it."² In the case of John Merryman,³ arising in 1861 at the opening of the Civil War, Chief Justice Taney held that the suspension of the privilege of the writ was a prerogative of Congress rather than of the executive, and at different times during the Civil War Congress passed acts suspending the writ. President Lincoln, on the other hand, assumed that the right to suspend belonged to the executive, and acted in accordance with that view at the opening of the war and before Congress was convened in special session. In a message to Congress he vigorously defended the legality of his action; and Congress, in order to remove any question of legality, passed various acts of indemnity to meet the situation which had thus arisen.⁴

Congress may provide for as large a professional or standing army as it desires. Our traditions, however, in common with those of English-speaking peoples everywhere, are opposed to the maintenance of large standing armies in time of peace, and hence much attention has been given to the organization and training of volunteer militia, now known officially as the National Guard. The powers of Congress with respect to the militia are both explicit and extensive. Congress is expressly authorized to "provide for organizing, arming, and disciplining the militia," and it may provide for

CHAP.
XXV

4. Suspension of habeas corpus

5. Regulation of the National Guard

¹ See E. B. Creecy, "Courts-Martial," *Amer. Jour. Crim. Law and Criminol.*, X, 202-207 (Aug., 1919).

² Art. I, § 9, cl. 12. The writ of habeas corpus is issued by a court, or by a single judge, upon petition of a person who deems himself to be illegally held in confinement, or upon petition of some one in his behalf. The "privilege" of the writ lies in the opportunity it gives to such a person to have the court promptly investigate the legality of the confinement; if detention is shown to be without legal warrant, the court will order the petitioner's release. If, on the other hand, valid grounds for it are found, the party may be remanded to custody or released upon bail. The writ is of early English origin, and it issues from state, as well as from national, courts. Unlike the national constitution, a few of the state constitutions, *e.g.*, Oklahoma, declare that the privilege of the writ of habeas corpus shall never be suspended. See *In re Neagle*, 135 U. S., 1 (1890); A. C. McLaughlin and A. B. Hart, *Cyclo. Amer. Govt.*, II, 105-106.

³ W. W. Willoughby, *Constitutional Law of the United States*, II, 1255-1258.

⁴ See p. 253. Cf. J. D. Richardson, *Messages and Papers of the Presidents*, VI, 25; S. G. Fisher, "Suspension of Habeas Corpus during the War of the Rebellion," *Polit. Sci. Quar.*, III, 454-488 (Sept., 1888); G. C. Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress* (Madison, 1907).

calling out the militia for three distinct purposes, namely, to execute the national laws, to suppress insurrections, and to repel invasions. Congress is also empowered to provide for governing such part of the militia as may be "employed in the service of the United States," although the appointment of the militia officers and the authority to train the militia in accordance with congressional regulations are expressly reserved to the states.¹ In exercising these broad powers Congress has enacted numerous laws with a view to increasing the effectiveness of the National Guard and coördinating its organization, training, and equipment more and more closely with that of the regular army.²

Lastly, Congress is authorized to purchase sites within the states, with the consent of the legislatures thereof, for the erection of forts, magazines, arsenals, dockyards and other needful buildings; and over such "military reservations" it may exercise "exclusive legislation."³

6. Establishment of military reservations

REFERENCES

- A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), II, 57-58, Freedom of Speech; 105-106, Habeas Corpus; 439-440, Militia; III, 646-653, War Powers.
- W. W. Willoughby, *Constitutional Law of the United States* (New York, 1910), I, Chaps. III, XL; II, Chaps. XLIV-XLV, LXI-LXII, LXV.
- C. K. Burdick, *The Law of the American Constitution* (New York, 1922), Chaps. VI, IX, XIII.
- E. McClain, *Constitutional Law in the United States* (New York, 1905), Chaps. III, X, XVI-XVIII.
- E. Kimball, *National Government of the United States* (Boston, 1920), Chap. xx.
- J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chap. XXXIII.
- J. P. Hall, *Constitutional Law* (Chicago, 1917), Chaps. XII.
- S. W. McCall, *The Business of Congress* (New York, 1911), Chap. I.
- J. M. Mathews, *American Foreign Relations: Conduct and Policies* (New York, 1928), Chaps. XXVIII-XXIX.
- J. T. Young, *The New American Government and Its Work* (rev. ed., New York, 1923), Chap. XI.
- R. H. Eliel, "Freedom of Speech," *Amer. Polit. Sci. Rev.*, XVIII, 712-736 (Nov., 1924).
- W. Thompson, "The Trend toward Federal Centralization," *Annals of the Amer. Acad. of Polit. and Soc. Sci.*, CXIII, 172-182 (May, 1924).

¹ Art. I, § 8, cls. 15-16.

² See pp. 252, 254; *U. S. Compiled Statutes* (1918), pp. 396-417; *ibid.* (1923), pp. 151-159; *Code of the Laws of the U. S.* (1926), pp. 1033-1046.

³ Art. I, § 8, cl. 17.

THE POWERS OF CONGRESS: GENERAL VIEW 473

- W. F. Willoughby, *Government Organization in War Time and After* (New York, 1919). CHAP.
XXV
- Z. Chafee, *Freedom of Speech* (New York, 1920).
- J. H. Wigmore, *Source Book of Military Law and War-Time Legislation* (St. Paul, 1918).
- W. B. Weeden, *War Government, 1861-1865* (Boston, 1906).
- W. Whiting, *War Powers under the Constitution of the United States* (10th ed., Boston, 1864).
- C. S. Potts, "Power of Legislative Bodies to Punish for Contempt," *Univ. of Pa. Law Rev.*, LXXIV, 691-725, 780-829 (May-June, 1926).
- G. B. Galloway, "The Investigative Function of Congress," *Amer. Polit. Sci. Rev.*, XXI, 47-70 (Feb., 1927).

CHAPTER XXVI

NATIONAL REVENUES

Financial
weakness
of the
Confedera-
tion, 1781-
1789

As a frame of government, the Articles of Confederation were fundamentally defective in that they gave Congress no dependable means of raising money. Congress was, indeed, authorized to make requisitions on the states, *i.e.*, to ask the state governments from time to time to turn over for national use funds raised by them within their several jurisdictions in such manner as they might adopt. But the national authorities had no way, other than the use of armed force, of compelling a state to heed the requests thus made; and in practice most states largely ignored or evaded them. Congress itself had absolutely no power to tax; it could not reach down past the state governments to the individual citizen, levy a money charge on his property or business or income, and enforce payment by seizing and selling the possessions of delinquents. Yet, as all experience shows, without this power, no government can, in the long run, exist. Two attempts were made, in 1781 and 1783, to amend the Articles so as to give Congress a restricted power to impose duties on imports. On the first occasion, however, Rhode Island, and on the second, New York, held out against the change, thereby (since unanimity was required for the adoption of amendments) preventing it from being made.¹

The taxing
clause of
the con-
stitution

It is not to be wondered at, therefore, that the convention of 1787, called for the purpose of revising the Articles and rendering them "adequate to the exigencies of government," took it for granted from the first that, whatever else was done or not done, the national government was to be endowed with independent revenue-raising authority. And, very appropriately, the long list of powers given to Congress in the eighth section of the first article of the constitution starts off with the power "to lay and collect taxes, duties, imposts and excises." Under this grant Congress raised by taxation, down to 1910, the sum of twenty billion dollars; under it, nearly six billion dollars were raised in the single fiscal year ending June 30, 1920.

¹G. T. Curtis, *Constitutional History of the United States* (rev. ed.), I, Chaps. VIII, X.

Comprehensive, however, as is the taxing power thus granted to the national government, taxes must be laid in accordance with several express or implied restrictions. Congress is not free, for example, to lay and collect taxes for any and all purposes whatsoever, but only "to pay the debts and provide for the common defense and general welfare of the United States." The first two purposes are definite enough; but the phrase "general welfare" is broad and loose, and as a restriction upon the taxing power it is not of great practical importance; it merely means that money raised by taxation may be appropriated only for public, as distinguished from private, purposes. If, therefore, Congress is satisfied that any public purpose—in other words, the *general* welfare—will be promoted by levying taxes, its judgment is final, and the validity of such taxes cannot, in general, be challenged; and there is no limit to the tax-rate that Congress may lawfully impose. Moreover there is no restriction whatever on the power to incur indebtedness, although such indebtedness may have to be paid by taxation. Hence we find Congress promoting the "general welfare" by imposing taxes in aid of institutions of higher learning, although they are attended by only a comparatively small part of the population, for the assistance of "world's fairs" and similar expositions, for the maintenance of Yellowstone Park and other national parks in remote sections of the country, for the protection of seals whose skins can be worn only by the well-to-do, for the preservation of game on a National Bison Range, for the construction of the Panama Canal and of enormous irrigation works in the western states, and for the erection of monuments to the memory of departed heroes and statesmen.¹

CHAP.
XXVI

Restrictions
on the
national
taxing
power:

1. Purposes
of taxation

The taxing power is limited by the requirement that direct taxes shall be apportioned among the several states according to their population.² Congress first determines the total amount to be raised by direct taxation, and each state's quota is then fixed in proportion to its population and assessed upon the property of the individual citizen. The phrase "direct taxes" is not defined in the constitution, and long controversies arose out of this fact when it was desired to lay a tax on incomes. As defined in various decisions of the Supreme Court prior to 1895, the phrase included

2. Appor-
tionment
of direct
taxes

Direct
taxes
defined

¹ A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, II, 8.

² Art. I, § 2, cl. 3.

only poll or capitation taxes and taxes on real estate.¹ Direct taxes, in this sense, have been levied on only five occasions, the last being in 1861, when a direct tax of twenty million dollars was laid on lands, improvements, and dwelling houses.² Economic conditions made this levy an anachronism, for wealth was not distributed according to population, and personal property had increased far more rapidly than real estate. The eastern manufacturing centers were therefore favored at the expense of the agricultural districts.

In 1862 Congress for the first time imposed a tax upon incomes, with certain exemptions. Assuming that an income tax was not a direct tax, it made no effort to apportion the tax among the states according to their population, but rather made it apply uniformly to the various classes affected by it. In a test case which eventually reached the Supreme Court, opponents of the law argued that an income tax was a direct tax, which required apportionment, and that therefore the law in question was unconstitutional.³ Adhering, however, to the earlier judicial definitions of direct taxes, the court decided that an income tax is not a direct tax, and accordingly upheld the constitutionality of the law. Before the decision was rendered the tax was, in point of fact, repealed by Congress. Some thirty years then passed. Finally, in 1894, Congress, acting under pressure from a small group of Populist members who then held the balance of power, levied another income tax.⁴ This law did not differ essentially from that of 1862, and both Congress and the general public assumed that one was just as valid as the other. Nevertheless it was challenged in the courts upon grounds similar to those urged against the constitutionality of the previous measure; and in 1895 the Supreme Court, reversing precedents of long standing, extended the meaning of "direct taxes" to cover taxes imposed on incomes derived both from land and from personal property, which must, therefore, in order to be constitutional, be

¹ *Hylton v. United States*, 3 Dallas, 171 (1794); *Pacific Ins. Co. v. Soule*, 7 Wall., 433 (1868); *Veazie Bank v. Fenno*, 8 Wall., 533 (1869). See also C. J. Bullock, "The Origin, Purpose, and Effect of the Direct-Tax Clause in the Federal Constitution," *Polit. Sci. Quar.*, XV, 217-239, 452-484 (Sept.-June, 1900).

² Slaves had also been included under the laws of 1798, 1813, 1815, and 1816. A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, III, 508.

³ *Springer v. United States*, 102 U. S., 586 (1800). See C. G. Tiedeman, "The Income Tax Decisions as an Object Lesson in Constitutional Construction," *Annals of Amer. Acad. Polit. and Soc. Sci.*, VI, 268-279 (Sept., 1895).

⁴ C. F. Dunbar, "The New Income Tax," *Quar. Jour. Econ.*, IX, 26-46 (Oct., 1894).

apportioned according to population. Since the act in question levied the tax on a basis of uniformity, it was declared unconstitutional.¹

CHAP.
XXVI

For this decision the Supreme Court was roundly criticized on the stump and in the Democratic and Populist platforms in the presidential campaign of 1896. But nothing was done to remedy its effect—indeed, in the nature of the case little could be done—until in response to growing popular demands, and with a view to helping meet increasing burdens upon the treasury, Congress, in 1909, approved and referred to the states the Sixteenth Amendment, which, as we have seen, became effective in 1913.² Since that date, Congress has been permitted to “lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states.” The result is that taxes upon incomes from real and personal property, despite the decision of the Supreme Court rendered in 1895, continue to be classed as indirect or excise taxes. Congress is thus relieved from the necessity of apportioning such taxes according to population, a thing which would be quite impossible without inflicting grave injustice upon the people of some states.³ Promptly upon the ratification of the Sixteenth Amendment, Congress passed the income tax law of 1913, which, with modifications, is still in force.⁴ Indeed it may safely be said that the taxation of incomes has become a permanent part of our national fiscal policy.

Sixteenth
Amend-
ment

By far the greatest part of the national revenue has always come from indirect taxes, and in laying these Congress is restricted by the constitutional requirement that “all duties, imposts, and excises shall be uniform throughout the United States.”⁵ This does not prevent a tax upon tobacco, for example, from falling more heavily upon sections where much tobacco is raised than upon others where little is raised; it merely means that all tobacco of a certain quality or weight shall be taxed at the same rate in all parts of

3. Uni-
formity of
indirect
taxes

¹ *Pollock v. Farmer's Loan and Trust Co.*, 158 U. S., 601 (1895).

² See p. 184.

³ *Brushaber v. Union Pacific R. R.*, 240 U. S., 1 (1916). The Sixteenth Amendment does not extend the taxing power of the national government to new sources. Any income that was exempt from taxation before the amendment—such as salaries of state officers—is still exempt. The amendment merely abolished apportionment. *Evans v. Gore* 253 U. S., 245 (1920); *Miles v. Graham* 268 U. S., 501 (1925).

⁴ R. G. Blakey, “The New Income Tax,” *Amer. Econ. Rev.*, IV, 25-36 (Mar., 1914); R. H. Montgomery, “Our Bungling Income Tax Law,” *World's Work*, LIII, 501-510 (Mar., 1927).

⁵ Art. I, § 8, cl. 1.

the country; and that when duties are laid on imports, the rates upon any class of commodities shall be the same at Atlantic, Pacific, or any other, ports of entry. This requirement of uniformity does not apply, however, to goods coming into the country from Porto Rico or the Philippines; they may be taxed at rates different from those which apply to imports from foreign lands. Under the decisions of the courts, Congress is free to impose such duties as it sees fit upon commodities coming from the insular dependencies.¹

Other restrictions upon the taxing power of the national government are to be found (a) in the constitutional provision which forbids the laying of duties upon exports, although Congress is authorized to regulate export trade in every way save by taxation; (b) in the implied limitation arising from the nature of the federal union, as previously explained, which prevents Congress from taxing the property or the essential governmental functions of the several state governments and of municipalities created by them, including the salaries of state and local officials;² and (c) in the principle recently laid down by the Supreme Court to the effect that Congress may not use its taxing power merely to regulate matters, such as manufacturing, whose regulation has been reserved to the states.³

Except as restricted in the foregoing ways, Congress is free to select any or all objects or persons to be subject to taxation, and is absolutely untrammelled by constitutional limitations in determining the amount which shall be raised by various kinds of taxes. The Supreme Court has repeatedly held that if it can be shown that Congress has the authority to tax any class of persons or articles at all, the determination of the amount, as well as the

¹ *De Lima v. Bidwell*, 182 U. S., 1 (1901); *Downes v. Bidwell*, 182 U. S., 244 (1901); *Dooley v. United States*, 182 U. S., 222 (1901).

² *Collector v. Day*, 11 Wallace, 113 (1870). The language of the Sixteenth Amendment seems broad enough to cover taxes on the salaries of state and local officers, but the Supreme Court has held that the amendment does not extend the taxing power of Congress to such new or excepted subjects. More recently the Court has also held that a general tax on incomes does not apply to the salaries of federal judges because that would constitute a diminution of their compensation, which is prohibited by Art. III, § 1, of the constitution. The same principle would exempt the president's salary from such a tax if the tax is imposed after he takes office; on the other hand, if the tax is imposed *before* he takes office, he cannot benefit by its repeal unless re-elected thereafter, in view of Art. II, § 1, cl. 7. See *Evans v. Gore*, 252 U. S., 245 (1920), and comments in *Amer. Polit. Sci. Rev.*, XIV, 641-643 (Nov., 1920); E. S. Corwin, "Constitutional Tax Exemption—the Power of Congress to Tax Income from State and Municipal Bonds," *Nat. Mun. Rev.*, XIII, Supplement, 51-67 (Jan., 1924).

³ In *Bailey v. Drexel Furniture Co.*, 259 U. S., 20 (1922), denying the constitutionality of the child labor tax of 1919.

expediency, of the tax rests with Congress alone; and that the remedy for excessive or inequitable taxation lies, not with the courts, but with the electorate. Most laws imposing taxation can readily be classed as revenue laws, *i.e.*, laws in which the primary, if not the sole, purpose is to produce income for the government.¹ There are measures, however, which—although tax laws in form—aim only incidentally to bring in revenue; thus, tariff schedules designed to protect American industries against foreign competition often carry rates too high to be productive. Indeed Congress has at times gone so far as to impose taxes with the avowed purpose of destroying a business. Thus, in order to give national banks a monopoly of the business of issuing bank notes, a tax of ten per cent was laid in 1866 on the notes issued by state banks; in other words, state bank notes were taxed out of existence.² The Supreme Court has found little difficulty in sustaining such laws, on the ground that Congress has the right to impose taxes as a means of rendering effective some expressly granted power, for example, the regulation of commerce or of the coinage.

But is a tax constitutional when it is not clearly either a revenue measure or a means of rendering effective some other delegated power? This question was raised by the law of 1902 laying a prohibitive tax upon oleomargarine,³ by the act of 1912 placing a similar tax upon the manufacture of poisonous phosphorous matches,⁴ by the narcotics drug laws of 1914 and 1919 imposing a tax upon registered dealers,⁵ and by the law of 1919 imposing a special tax on the incomes of concerns employing children under the age of sixteen.⁶ In cases coming before it at different times, the Supreme Court upheld both the oleomargarine and the narcotics law as revenue measures, refusing to inquire into the legislative motive.⁷ The constitutionality of the phosphorous match law has never been judicially tested. But when the child labor law was

¹ In the corporation, income, and inheritance taxes of the past few years it is easy to discern, along with the fiscal motive, the purpose to reduce the size of "swollen fortunes" and to bring about some readjustment of the national tax burden.

² *Veazie Bank v. Fenno*, 8 Wallace, 553 (1869).

³ *U. S. Compiled Statutes* (1918), pp. 987-991; *Code of the Laws of the U. S.* (1926), p. 777.

⁴ *U. S. Compiled Statutes* (1918), pp. 994-995; *Code of the Laws of the U. S.* (1926), p. 783.

⁵ *U. S. Compiled Statutes* (1918), pp. 996-998; (1923), pp. 591-593; *Code of the Laws of the U. S.* (1926), p. 742.

⁶ *U. S. Compiled Statutes* (1923), pp. 451-452.

⁷ *McCray v. United States*, 195 U. S., 27 (1904); *United States v. Doremus*, 249 U. S., 86 (1919).

challenged, the Supreme Court for the first time took into account the real motive animating Congress, and made such motive a test of legislative action. Refusing to look upon the law as a revenue measure, the Court viewed it as an attempt by Congress to bring within its control, by means of the taxing power, matters normally falling to the states alone to regulate; and for this reason the measure was held not to be a valid exercise of the taxing power.¹

Yield of
direct and
indirect
taxesCustoms
dutiesInternal
revenue

Of the total revenue collected by the national government between 1789 and 1910, only a relatively small portion, namely, about twenty-eight million dollars, came from direct taxes; and after the Civil War that form of taxation was left entirely to the states, at all events until the enactment of the federal income tax law of 1913.² During the same period custom duties on imports yielded more than eleven billion dollars, and excise taxes, chiefly, on liquors and tobacco, produced eight and one-half billions—a total from indirect taxation of about ninety-six per cent of the entire national income.³ The first taxes laid by the new government under the constitution were duties on imports, and down to the Civil War such duties formed the most important single source of revenue. The falling off in their yield at the beginning of that conflict, however, together with the extraordinary demands made upon the national treasury throughout the struggle, compelled Congress in 1862 to resort to excise or internal revenue taxes, which, until then had been employed only twice⁴ and on a modest scale.⁵ Not only were liquors and tobacco heavily taxed, but license fees were required of persons engaged in certain occupations, and taxes were for the first time imposed on incomes. Furthermore, not only were finished products taxed, but also the various stages and materials of manufacture, for example, bolts, castings, trimmings, etc., used in steam engines, and the paper, cloth, leather, boards, thread, glue, gold-leaf and type-material which went into the manufacture of a book. Stamp taxes, too, were imposed on commercial paper,

¹ *Bailey v. Drexel Furniture Co.*, 259 U. S., 20 (1922). For a brief critical review of this decision, see *Amer. Polit. Sci. Rev.*, XVI, 612-616 (Nov., 1922). See also W. Thompson, *Federal Centralization*, Chap. IV; *New Republic*, XXXI, 177-179, 248-250 (July 12 and 26, 1922). J. R. Long, "Federal Police Regulation by Taxation," *Va. Law Rev.*, IX, 81-97 (Dec., 1922).

² See pp. 475-476.

³ A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, II, 6.

⁴ In 1791-1802 and 1813-1818.

⁵ It must be observed, of course, that the government has never been entirely dependent on the proceeds of taxation. The income from the sale of public lands, for example, was for many years large.

insurance policies, deeds, mortgages, and other documents.¹ Indeed, any student of our national tax policy in the Civil War era will have no difficulty in seeing where Congress found precedents for many of the extraordinary excise taxes laid during the Spanish-American War in 1898,² and especially during our participation in the World War in 1917-18.

At no time after the Civil War was it deemed feasible to dispense with excise taxes; on the contrary, they established themselves as a permanent part of our fiscal system and continued to yield varying proportions of the total national revenue. By successive acts in and after 1866 Congress, indeed, remitted the taxes on many articles and processes, and eventually the only things taxed were certain luxuries, chiefly liquors and tobacco. Mounting revenues and treasury surpluses after 1880 led extreme protectionists to urge that even these taxes be abolished. But the only action taken was to reduce the rates, and the Spanish-American War ended all talk of dispensing with the excise system completely. Within a decade, indeed, Congress, far from abolishing the system, extended it to new fields, with a view to obtaining increased revenue with which to meet the again rapidly mounting expenses of the government, and also as a "weapon to compel economic readjustments."

In 1909, for example, a tax was imposed on the net income or profits of practically all corporations organized for profit;³ and after the ratification of the Sixteenth Amendment in 1913 a tax was laid on all private incomes above stated amounts. The outbreak of the war in Europe in 1914 reduced receipts from customs and at the same time made new and heavy expenditures imperative. Accordingly, excise duties were increased; license taxes were imposed on business and amusement establishments; stamp taxes were laid on insurance policies, telegraph messages, etc.; and in 1916 the fourth progressive inheritance tax in our history was adopted.⁴ Our actual

New taxes

¹ A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, III, 212. See also H. E. Smith, *The United States Federal Internal Tax History from 1861 to 1881* (Boston, 1914).

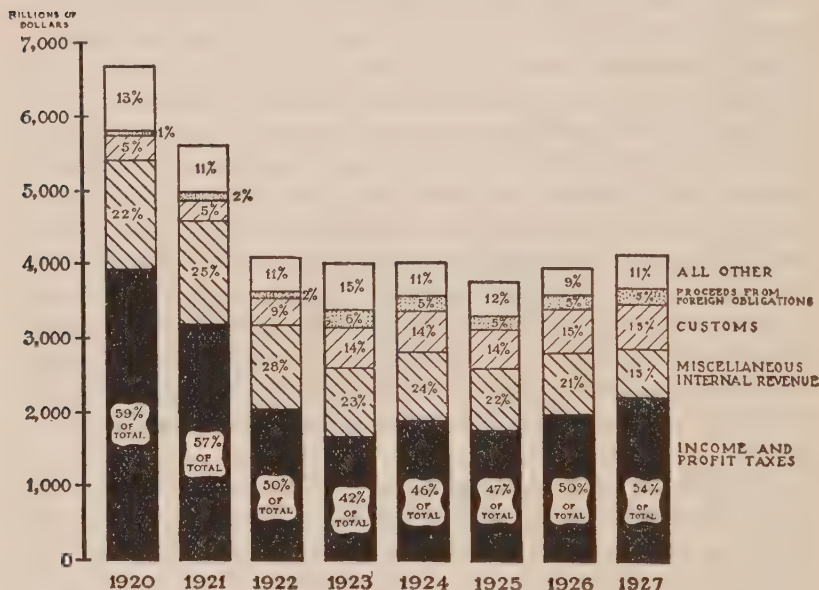
² C. C. Plehn, *Finances of the United States in the Spanish War* (Berkeley, 1898).

³ C. A. Conant, "The New Corporation Tax," *No. Amer. Rev.*, CX, 231-240 (Aug., 1909).

⁴ Inheritance tax laws were passed in 1797 (repealed in 1802), 1862 (repealed in 1870), and 1898 (repealed in 1902). "These were strictly legacy taxes, however, on personal estates, with the exception of the 'succession tax' on real property levied in 1864 and repealed in 1870." *Amer. Year Book* (1916), 351. See M. H. Hunter, "The Inheritance Tax," *Annals of Amer. Acad. Polit. and Soc. Sci.*, XCV, 165-180 (May, 1921).

participation in the war in 1917-18 naturally entailed an unprecedented increase in the range and amount of taxation.¹ All existing tax rates were raised, and an immense number of persons, occupations, products, and manufactures that had been exempt were now obliged to contribute to the support of the government in its great enterprise. Of these newer taxes, the most important were a

ORDINARY RECEIPTS



Principal sources of ordinary receipts for the fiscal years 1920 to 1927

Reproduced, by permission, from the *Annual Report of the Secretary of the Treasury* (1927), 5.

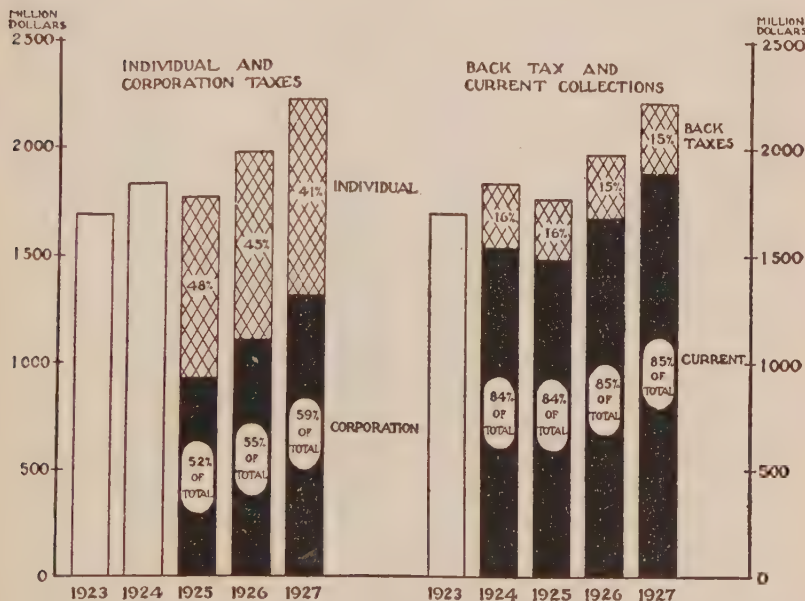
heavy and progressive tax upon excess profits, suggested by the recent experiences of our associates in the European struggle, and greatly increased rates on incomes and inheritances. Since the end of the war it has been found possible to remit a few taxes altogether and to lower the rates of many others. The enormously increased national debt, together with continued expansion of governmental activity in various directions, will probably serve to keep taxation for some years to come at a considerably higher level than in the years preceding the World War.

¹ E. R. Seligman, "The War Revenue Act," *Polit. Sci. Quar.*, XXXIII, 1-37 (Mar., 1918); F. W. Taussig, "The War Act of 1917," *Quar. Jour. Econ.*, XXXII, 1-37 (Nov., 1917); R. G. Blakey, "The War Revenue Act of 1917," *Amer. Econ. Rev.* VII, 791-815 (Dec., 1917); R. M. Haig, "The Revenue Act of 1918," *Polit. Sci. Quar.*, XXXIV, 369-391 (Sept., 1919).

Inasmuch as both Congress and the states may tax the same persons or property at the same time, there has always been a possibility of double taxation. Except in war-times, however, Congress has confined national taxation mainly to import duties¹ and a few excise taxes, thus leaving to the states almost a monopoly of the taxation of real estate, personal property, corporations, in-

CHAP.
XXVI
Double
taxation

INCOME TAX COLLECTIONS



Income tax collections for the fiscal years 1923 to 1927, distributed according to individual and corporation taxes and according to back taxes and current collections. (The former distribution was not made until 1925 and the latter until 1924)

Reproduced, by permission, from the *Annual Report of the Secretary of the Treasury* (1927), 6.

comes, and inheritances. With the enactment of the national corporation tax in 1909, the income tax in 1913, and the progressive inheritance tax in 1916, however, and the marked extension of the list of kinds of personal property subject to excise taxes, the amount of double taxation has been greatly increased. As a result, problems of the utmost importance and of great intricacy have arisen, and the determination of the proper spheres of the national and

¹ Congress has practically exclusive power to tax imports and lay tonnage duties, in view of the restrictions on the states in these matters. See Art. I, § 10, cl. 2.

state governments, respectively, in the taxation of coming years promises to be no easy task.

The receipts of the government from all sources during the fiscal year ending June 30, 1927, aggregated \$9,996,628,019.20. Of this huge sum, however, only \$4,128,422,887.61 is classed as "ordinary receipts"—a term which covers customs duties, internal revenue, proceeds from the sale of government-owned securities and surplus property, Panama Canal tolls, trust fund receipts, and numerous miscellaneous items.¹ The following table² shows the principal sources of national income and incidentally discloses the chief subjects of national taxation.

Public debt receipts	\$5,185,083,142.93
Postal revenues	683,121,988.66
Customs duties	605,672,465.18
Internal revenue taxes	2,868,684,883.72

Made up, in part, of

Taxes on incomes and profits.....	\$2,219,952,443.72	
Inheritance (estates) taxes	100,339,851.96	
Alcoholic beverages	21,195,571.96	
Tobacco and its manufactures.....	376,170,205.04	
Manufacturers excises (automobiles, motorcycles, etc.)	66,850,109.40	
Capital stock of corporations.....	8,970,230.93	
Oleomargarine tax	3,164,218.94	
Admissions to amusements	17,940,636.69	
Club dues tax	10,436,020.79	
Miscellaneous sources		654,480,115.85

Made up, in part, of

Sale of war supplies.....	8,624,560.72
Sale of miscellaneous government property	8,934,522.44
Public domain	25,293,764.76
Profits on coinage, etc.....	9,130,112.82
Collections under prohibition laws..	502,876.72
Immigration head-tax	3,271,903.10
Loans to foreign governments—	
Principal	45,699,572.81
Interest	160,389,599.90
District of Columbia	30,511,554.74
Premiums on life insurance.....	65,846,078.40
Railroad securities	89,725,932.32
Panama Canal tolls, etc.	25,376,731.17

Collection
of revenue

1. Customs
duties

Most of the national revenue is collected under the general supervision of the secretary of the treasury, by one or the other of two branches of that department, namely, the customs and internal revenue services.³ For the collection of customs duties the

¹ For details, see *Annual Report of the Secretary of the Treasury* (1927).

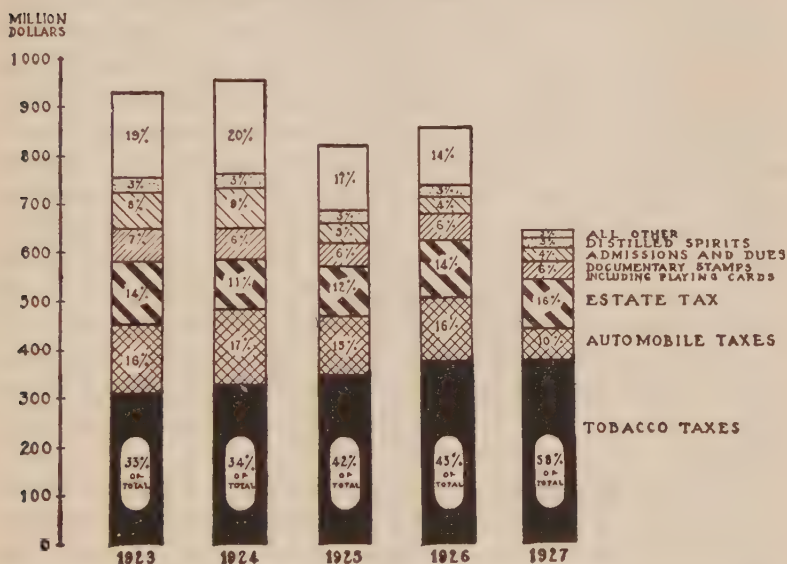
² Compiled from *ibid.*, 421 ff.

³ L. F. Schmeekebier, "The Customs Service," *Service Monograph* No. 33 (Baltimore, 1924); L. F. Schmeekebier and F. X. A. Eble, "The Bureau of Internal Revenue," *ibid.*, No. 25 (1923).

country has been divided into forty-seven collection districts, each containing a main port of entry in charge of a collector or deputy collector of customs, who is regularly a political appointee. Duties may be paid at any one of a total of more than three hundred main and subsidiary "ports of entry," all located on the Pacific

CHAP.
XXVI

MISCELLANEOUS INTERNAL REVENUE



Principal sources of miscellaneous internal revenue collections for the fiscal years 1923 to 1927

Reproduced, by permission, from the *Annual Report of the Secretary of the Treasury* (1927), 13.

and Atlantic coasts, on or near the Canadian and Mexican borders, or in Alaska, Hawaii, and Porto Rico; a port of entry being officially defined as a place "at which a customs officer is stationed with authority to enter and clear vessels and collect duties on imports."¹ The internal revenue service is in charge of a commissioner of internal revenue, under whom is a staff of several thousand officials engaged in the collection of the various internal revenue taxes. The country is divided for this purpose into sixty-five districts, each with a collector of internal revenue and a large number of deputy collectors. The latter have at times been selected in accordance with merit rules, and at other times have been political appointees; the collectors themselves have never been put on

2. Internal
revenue

¹ See *Customs Regulations of the United States*, issued at frequent intervals by the Treasury Department.

the merit basis.¹ The work of these collectors and their assistants includes not only the gathering of the regular excise taxes, *e.g.*, on tobacco, but the collection of the corporation and income taxes as well. Formerly, the collection of the national revenues was to a large extent automatic. That is to say, foreign goods could not be imported, and domestic goods subject to taxation could not be manufactured or sold, until the importer, manufacturer, or dealer had paid whatever taxes were due. In the case of importations, cash payments prevailed; in the case of excises, the method was mainly that of the sale of stamps or licenses. Beginning with the corporation tax law of 1909, however, other and more complicated methods have been introduced, although the customs and ordinary internal taxes continue to be gathered as before. The collection of the personal and corporate income taxes, and of the inheritance and excess profits taxes, is based upon sworn statements of the taxpaying individual or corporation. Such statements may be evaded or falsified, and consequently much time and energy must be given by the revenue authorities to investigative work. Any statement may be challenged and minutely inquired into if the revenue officers have reason to doubt its accuracy or completeness.

3. Miscellaneous revenues

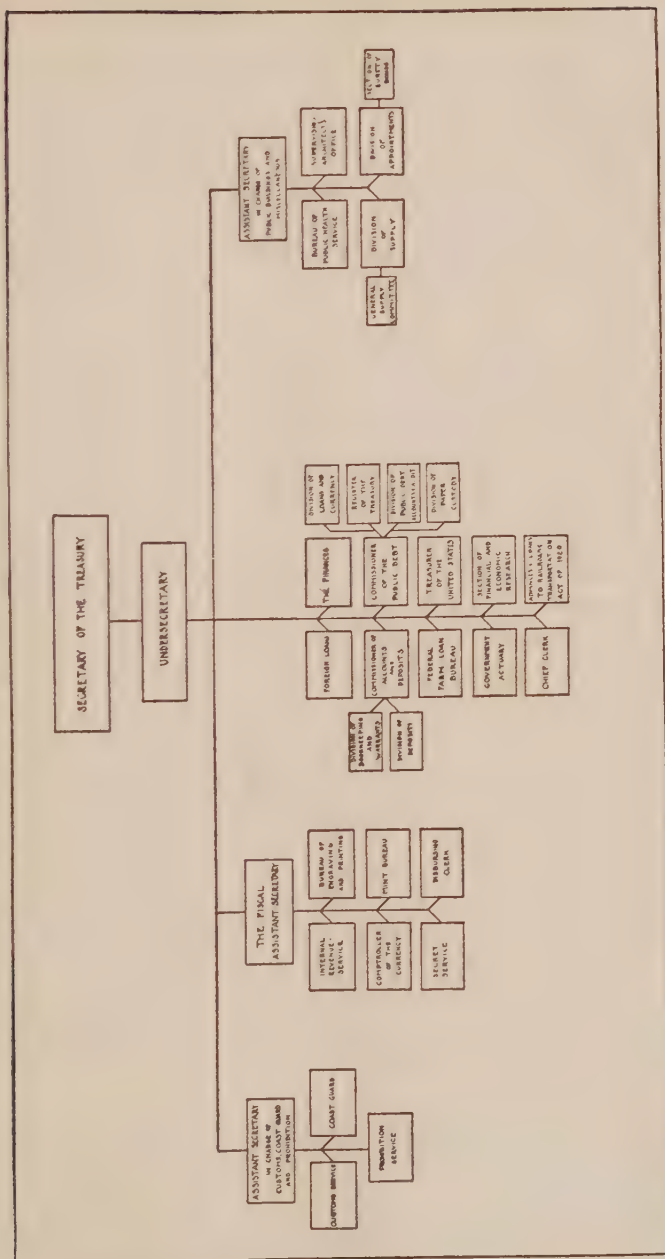
Of course not all of the national income is collected by the customs and internal revenue services. Large amounts accrue every year in the form of postal revenues, income from the mint, fees for patents, copyrights, steamboat and other licenses not classed as excise taxes, proceeds of the sale of government property, especially public lands and war supplies, and the yield of fees and fines in the courts. All of these moneys are collected directly by the various agencies concerned, and, like the proceeds of the customs and internal revenue, are turned into the general treasury.

Treasury system

The treasury of the United States is located at Washington, where there are vaults specially constructed for the keeping of the money and securities of the government. Formerly, large portions of the revenue collected were deposited in one or another of nine sub-treasuries, situated in principal cities throughout the country, and money was paid out from these sub-treasuries on proper warrant.² The secretary of the treasury is, however, authorized to

¹ See "Reasons Why Deputy Collectors of Internal Revenue Should be Classified," in *42nd Annual Report U. S. Civil Service Commission* (1925), xxvi-xxix.

² M. L. Muhleman, *The Treasury System of the United States* (New York, 1907).



Organization of the Treasury Department, November, 1927
Reproduced, by permission, from the *Annual Report of the Secretary of the Treasury* (1927), 92.

designate various national banks as depositories and to place national funds in their keeping, provided they make a deposit with him of government bonds or other satisfactory securities; and upon the expansion of the national banking system by the creation of the federal reserve banks in 1913¹ this practice was so broadened as to lead in 1921 to the abandonment of the sub-treasuries altogether. The government's money is now kept principally, therefore, in the federal reserve banks, together with a reduced number of ordinary national banks, and is paid out from them on warrants properly issued and attested.²

All laws for raising revenue are required to originate in the House of Representatives. The framers of the constitution manifestly intended that the House, whose members alone were chosen directly by the electorate, should control the national purse, after the general manner of the House of Commons in England. The matter, however, has not worked out wholly in this way. All of the great revenue bills, as also the annual appropriation bills, are, indeed, first introduced in the House. But the Senate has unlimited power of amendment, and in practice most revenue bills are extensively and permanently reconstructed at the hands of that body. There is nothing to prevent the upper house from adding an amendment to a House revenue bill striking out all parts after the enacting clause and inserting an entirely new bill; and something of the sort has happened on several occasions, notably in 1872, when a House bill of only a few lines and affecting the duties on only two commodities was amended in the Senate into a measure covering twenty printed pages and comprising an extended revision of the tariff; and again in 1888-89, when a House bill to reduce taxation and reorganize revenue collection was transformed by the upper house into a general revision of both customs duties and internal taxes.³ Indeed, a bill which is in effect, and even almost in technical form, a bill to raise revenue may be passed in the Senate before the House has taken any action in the matter at all, as was, for

¹ See p. 512.

² On the history of the independent treasury system, see D. Kinley, *History, Organization, and Influence of the Independent Treasury of the United States* (New York, 1893), and "The Independent Treasury of the United States and Its Relations to the Banks of the Country," 61st Cong., 2nd Sess., Sen. Doc. No. 587 (1910).

³ A. M. Low, "The Usurped Power of the Senate," *Amer. Polit. Sci. Rev.*, I., 1-16 (Nov., 1906). Cf. P. S. Reinsch, *American Legislatures and Legislative Methods*, 108-112.

example, a postal salary and rate bill in January, 1925.¹ In 1926 Congress created a new agency for the preparation of the revenue act of 1928. This took the form of a joint bipartisan commission consisting of five members of the Senate committee on finance and five members of the House ways and means committee. Upon this commission was imposed the duty (a) of investigating the operation, effect, and administration of the federal system of internal revenue taxes, and of measures and methods for the simplification of such taxes, especially the income tax, and (b) of reporting to their respective houses before December 31, 1927.²

CHAP.
XXVI

With the exception of the internal revenue acts, the most important revenue measures, under normal conditions, are the laws commonly known as tariff acts, which prescribe the duties to be imposed upon articles imported from other countries. In the tariff acts of 1909 and 1913 the numerous articles subject to duty were grouped together in fourteen different "schedules," lettered from "A" to "N" inclusive, but in the act of 1922, the schedules were numbered instead of lettered.³ Following the schedules is usually a list of articles placed on the free list. These acts also include elaborate provisions for their administration or enforcement. Sometimes, too, a tariff act contains sections imposing internal taxes, or excises, of one kind or another. For example, the act of 1909 provided for a tax on the net income of corporations, and that of 1913 included the income tax law of that year. As a rule, however, internal revenue taxes have been imposed in laws which are separate from any tariff act, *e.g.*, the emergency revenue act of 1914 and the revenue acts of 1917 and 1921.

Tariff
legislation

The framing of a tariff bill, or of any other revenue measure, is the peculiar function of the committee on ways and means of the House of Representatives. Because of the political importance of all such measures, especially tariff bills, this committee and the corresponding Senate committee on finance have come to be second in importance to no other strictly legislative committees. The ways and means committee consists of twenty-five members (1927), fif-

Framing
tariff bills1. In com-
mittee

¹ The primary purpose of this measure was, indeed, to increase the compensation of certain classes of postal employees. But in order to secure the necessary funds, postal rates on various kinds of mail matter were pushed upwards. After conference, the bill became law with the approval of the president. See p. 326.

² *Code of the Laws of the U. S.* (1926). The various hearings held by this commission in the course of its investigation are reported at length in *U. S. Daily*, beginning with the issue for October 31, 1927.

³ *U. S. Compiled Statutes* (1923), pp. 289-360; *Code of the Laws of the U. S.* (1926), pp. 534-581.

teen belonging to the majority party and the rest to the minority party.¹ In the framing of tariff bills the minority members of the committee have little or no influence. The majority members are divided into a number of sub-committees, each of which is charged with the preparation of some portion of the bill, and their work is whipped into final shape by the rest of the majority. During the preparation of the bill, public hearings may be held for the purpose of gathering information; and lobbyists, representing the varied special interests which are likely to be benefited or adversely affected by tariff changes, are actively engaged in attempts to influence the action of majority members of the committee.² There have been instances in which certain schedules were largely prepared outside of the committee by the representatives of industries peculiarly interested in them—notably schedules dealing with steel and wool—and were accepted by the committee practically unchanged.³

2. In the
houses

After the majority members of the committee have come to an agreement upon the final form of the bill, the minority members are called in, so that a formal vote of the entire committee may be had upon the measure. Thereupon the bill is reported to the House,⁴ where it is almost certain to become the most important subject of debate during the session. The minority is usually given time in which to express dissent and criticism, but is seldom in a position to force any important changes if the bill, as almost invariably happens, is made a party measure. Having passed the House, the measure goes to the Senate, which may pass it with only slight changes or may alter it almost beyond recognition.⁵

¹ Before the Civil War some of the secretaries of the treasury took such a leading part, along with the committees on ways and means, in the framing of tariff measures as to give their names to certain of the resulting acts. Thus we have the Dallas act of 1816 and the Walker tariff of 1846. In later decades, however, most tariff measures have been called by the name of the chairmen of the committees responsible for them, as the McKinley bill of 1890, the Wilson-Gorman act of 1894, the Dingley act of 1897, the Payne-Aldrich act of 1909, the Underwood tariff of 1913, and the Fordney-McCumber act of 1922.

² S. M. Evans, "Making a Tariff Law," *Jour. Polit. Econ.*, XVIII, 793-815 (Dec., 1910). On recent tariff lobbying, see J. C. O'Laughlin, "The Invisible Government under the Searchlight," *Rev. of Revs.*, XLVIII, 334-338 (Sept., 1913); C. S. Thomas, "My Adventures with the Sugar Lobby," *World's Work*, XXVI, 540-549 (Sept., 1913).

³ S. M. Evans, "Schedule I, the Cotton Schedule," *World's Work*, XX, 13276-13285 (Aug., 1910).

⁴ In 1913 the Underwood bill was first debated in the Democratic caucus before being reported to the House.

⁵ Usually the Senate, through its finance committee, will have been working on a bill of its own, and large portions of this measure may be injected into the House bill. In 1909 the Senate adopted a bill of its own, as a substitute for the Payne bill which came up from the House, and the resulting Payne-

If important changes are introduced, the bill goes back to the House and is immediately referred to a conference committee representing both houses, which endeavors to effect a compromise. Whatever is agreed to by this conference committee, working in secret, is almost certain to pass both houses. In other words, opportunity is here offered for the insertion of important and far-reaching changes, not contemplated in the original or amended bill, at a time when it is usually too late for them to be considered by either house.¹

CHAP.
XXVI

From these facts it is apparent that the fixing of responsibility for national tax legislation is no easy matter. Certainly praise or blame cannot be concentrated on any single officer like the Chancellor of the Exchequer in England; rather, responsibility is divided, scattered, diffused. Each house shares it. But who among the five-hundred-odd members can be held to a strict accountability, especially when the final decisions of the powerful committees in charge of such measures are arrived at in secret? The general public, which is seldom adequately represented before these committees, has, in the past decade or two, come to look more and more to the president to interpose in its behalf his commanding influence as chief executive and as leader of his party.

Absence
of respon-
sibility

Tariff-making presents great difficulties, technical, economic, and political. The schedules have become exceedingly intricate—indeed, a veritable labyrinth, or jungle—so that even the most conscientious congressman knows the merits of hardly more than a small fraction of the provisions on which he is expected to vote. This fact has convinced many people, including members of Congress and two recent presidents, that the old type of tariff legislation, carried on largely in a partisan spirit and in ignorance of the conditions involved, by small groups of members of Congress acting under the spur of special interests, ought to give place to legislation based upon scientifically ascertained and up-to-date information, which shall always be available for framers of tariff bills and for members of Congress generally. With this end in view, they have

The Tariff
Commis-
sion

Aldrich act was a fusion of the two measures, worked out in conference committee. Of the 674 Senate amendments to the Underwood tariff bill of 1913, 426 were accepted without change by the House. "The permanent tariff law of 1922 was reported to the Senate with 2428 amendments, and in the final compromise the House yielded thirty times to the Senate's once." L. Rogers, *The American Senate*, 111.

¹ In 1922 the House repudiated the unauthorized action of the conference committee relating to the potash and dyestuffs embargo provisions. See *The Searchlight*, VII, 16-19 (Sept., 1922), and p. 415, note 2, above.

advocated the establishment of a permanent and impartial tariff board or commission. Such a board was provided for in the Payne-Aldrich act of 1909; but in 1913 a Democratic Congress cut off all appropriation for its support, and it came to an end. As late as 1915 President Wilson declared that the United States had all the machinery that was needed for investigation of tariff problems. Early in 1916, however, he changed his views and vigorously advocated a tariff board to secure facts on which Congress might act in making tariff changes. As a result, the general revenue act of September 7, 1916,¹ created a Tariff Commission—wholly outside of any executive department—consisting of six members, representing the two leading parties, appointed by the president and Senate for twelve-year terms. Its principal duties are to investigate (1) the administrative, fiscal, and industrial effects of tariff laws; (2) the relation between rates on raw materials and finished products; (3) the effects of ad valorem and specific duties; (4) the effects of the tariff on labor; (5) tariff relations with other countries; (6) the best arrangement of schedules and classifications, and (7), unfair methods of competition and unfair acts in the importation of articles, or in their sale after importation.

The Tariff Commission has no power to make changes in tariff laws or in their administration; and until recently it could make no recommendations to the president or to Congress except of a general character. The tariff act of 1922, however, greatly extended the Commission's power by imposing the duty of investigating particular cases and making specific recommendations, which may result in a change of rates by presidential proclamation. As a result of this new responsibility, the Commission has completely reshaped the organization of its staff, which now functions in four main divisions: (1) the office of chief investigator; (2) the office of chief economist; (3) the legal division; and (4) the secretary's office. The staff's work is coördinated in an advisory board, which reports only to the Commission and is under its immediate direction.²

The provision, mentioned above, empowering the president to

¹ *U. S. Compiled Statutes* (1918), pp. 846-847; (1923), pp. 281-282, 333-335; *Code of the Laws of the U. S.* (1926), pp. 529-531. The members of the commission receive salaries of \$7,500. See F. W. Taussig, "The Proposal for a Tariff Commission," *No. Amer. Rev.*, CCIII, 194-204 (Feb., 1916); J. B. Reynolds, "The Tariff Commission Plan: Its Facts and Fallacies," *ibid.*, CCIII, 852-866 (June, 1916).

² See W. S. Culbertson, "The Making of Tariffs," *Yale Rev.*, XII, 255-274 (Jan., 1923); T. W. Page, "Our Tariff Troubles and the Remedy," *Rev. of Revs.*, LXX, 527-536 (Nov., 1924).

proclaim a change in tariff rates deserves more than passing mention, for it embodies an important departure from former tariff-making methods. Long ago Congress realized the futility of trying to regulate railway rates and services by detailed legislative enactments, and substituted the policy of laying down general principles or rules and leaving to the Interstate Commerce Commission the application of the rules in concrete cases. A policy closely resembling this was instituted in the tariff act of 1922. Realizing that a rigid schedule of customs duties suitable for today's needs may soon prove a misfit because of rapidly changing economic conditions, Congress for the first time placed in the tariff law an explicit statement declaring that the principle underlying our tariff system is that of equalizing cost of production. Then, in order that rates may be easily adjusted to changing circumstances without entailing wholesale revision by Congress, the president was authorized, after investigation and recommendation by the Tariff Commission in particular cases, to adjust individual tariff rates, upward or downward, and even to change the classification of articles or the basis of assessing certain duties—with the single limitation that no rate may be increased or decreased more than fifty per cent of the rate imposed in the law.¹

Notwithstanding its increased importance because of these new duties, the work of the Tariff Commission has proved highly disappointing in some quarters; confidence in its fairness has been seriously shaken by the evidence of partisanship and prejudice that has recently come to light.² It is to be hoped, however, that public confidence can be restored, for the Commission is of great potential

¹ F. W. Taussig, "The Tariff Act of 1922," *Quar. Jour. Econ.*, XXXVII, 1-28 (Nov., 1922); A. Borglund, "The Tariff Act of 1922," *Amer. Econ. Rev.*, XIII, 14-33 (Mar., 1923).

During the period from March, 1922, to June 30, 1927, the commission undertook seventy-two investigations and recommended changes in twenty-one instances—increases in sixteen and decreases in only five. *Amer. Year Book* (1925), 555-558; *Ibid* (1926), 566-571. On the earlier activities of the commission, see E. P. Costigan, "The United States Tariff Commission," *Searchlight on Congress*, IV, 16-20 (Sept., 1919); also Mr. Costigan's letter resigning from the Board, *N. Y. Times*, Mar. 15, 1928, *U. S. Daily*, Mar. 16, 1928.

² Early in 1926 the Tariff Commission was subjected to an investigation by a Senate committee. See S. Bent, "The Man Who Threw the Tariff Bomb," *Nation*, CXXII, 83-84 (Jan. 27, 1926); *Searchlight on Congress*, XI, 6-7 (Feb., 1926); F. W. Taussig, "The United States Tariff Commission and the Tariff," *Amer. Econ. Rev.*, Suppl., XVI, 171-202 (Mar., 1926); *Literary Digest*, LXXXVIII, Mar. 27, 1926, pp. 8-10, "The Tariff Commission under Fire," C. Hackett, "The Failure of the Flexible Tariff, 1922-1927," *New Republic*, LI, 244-247 (July 17, 1927). Early in 1926, the National Board of Farm Organizations adopted resolutions calling upon Congress to abolish the commission. *N. Y. Times*, Feb. 4, 1926.

importance, and there is ground for believing that it can be made of very great value in adjusting future tariff rates and in restricting the pernicious lobbying and log-rolling which have long attended the processes of tariff legislation.

REFERENCES

- A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), III, 212-214, Internal Revenue; 470-475, 482-489, Tariff; 490-493, Income Taxes; 507-508, Direct Taxes; 585-587, Underwood Tariff.
- C. C. Plehn, *Introduction to Public Finance* (5th ed., New York, 1926), Pt. II, Chaps. VI-VII, IX.
- J. T. Young, *The New American Government and Its Work* (rev. ed., New York, 1923), Chap. v.
- E. R. A. Seligman, *The Income Tax* (2nd ed., New York, 1914), 576-704.
- D. R. Dewey, *Financial History of the United States* (8th ed., New York, 1922).
- F. C. Howe, *Taxation and Taxes in the United States under the Internal Revenue System, 1791-1895* (New York, 1896).
- D. F. Houston, "Where Our Taxes Go and Why," *World's Work*, XLII, 480-487 (Sept., 1921); "What You Need to Know About Federal Taxation," *ibid.*, XLII, 586-589 (Oct., 1921); "Taxes—Which and Why," *ibid.*, XLIII, 103-107 (Nov., 1921).
- R. G. Blakey, "The Revenue Act of 1926," *Amer. Econ. Rev.*, XVI, 401-425 (Sept., 1926).
- C. A. Miller, "The U. S. Board of Tax Appeals: Its Jurisdiction and Practice," *Amer. Bar Assoc. Jour.*, XI, 169-173 (Mar., 1925).
- J. G. Korner, "The United States Board of Tax Appeals," *ibid.*, XI, 642-644 (Oct., 1925).
- A. L. Hopkins, "The United States Board of Tax Appeals," *ibid.*, XII 466-471 (July, 1926).
- F. W. Taussig, *Tariff History of the United States* (rev. ed., New York, 1910).
- E. Stanwood, *American Tariff Controversies*, 2 vols. (Boston, 1903).
- T. W. Page, *Making the Tariff in the United States* (New York, 1924).

CHAPTER XXVII

NATIONAL EXPENDITURES, DEBTS, BANKING, AND CURRENCY

Having seen the manner in which the national government obtains its revenues and the main sources of its income, we must now review the objects for which, and the methods by which, these immense sums are appropriated and expended. For the fiscal year ending June 30, 1927, expenditures, all told, amounted to \$9,975,157,977.15. Of this sum, however, considerably less than one-half (\$3,493,584,519.40) was chargeable against the "ordinary receipts" mentioned in the preceding chapter. Omitting disbursements included in the public debt account, the following table will give a fair idea of the way in which the national revenues were allocated in 1927 to the different branches or activities of the government.¹

		Expendi- tures
Legislative department		\$ 19,190,129.92
Including, Library of Congress.....	\$ 1,445,865.60	
Government Printing Office	2,568,566.79	
Executive Office		686,849.86
Veterans' Bureau		391,470,413.72
Other independent offices or commissions.....		35,442,771.15
Including, Tariff Commission.....	689,279.04	
Civil Service Commission.....	996,915.61	
Vocational Education Board.....	7,353,717.68	
Federal Reserve Board.....	2,508,732.03	
Federal Trade Commission.....	956,033.20	
Interstate Commerce Commission.....	7,434,082.36	
District of Columbia		37,566,520.57
Department of Agriculture		156,278,963.87
Including, Forest Service.....	10,417,265.11	
Bureau of Animal Industry.....	7,732,389.98	
Bureau of Agricultural Economics.....	4,758,569.19	
Weather Bureau	2,537,029.56	
Bureau of Public Roads, and road construction	92,517,253.39	
Coöperative Agricultural Extension Work	5,877,666.47	
Department of Commerce.....		31,125,629.24
Including, Patent Office.....	3,103,759.93	
Bureau of Lighthouses.....	10,040,355.99	
Bureau of the Census.....	2,131,847.35	
Bureau of Foreign and Domestic Commerce	3,194,640.40	
Bureau of Mines.....	2,473,439.40	

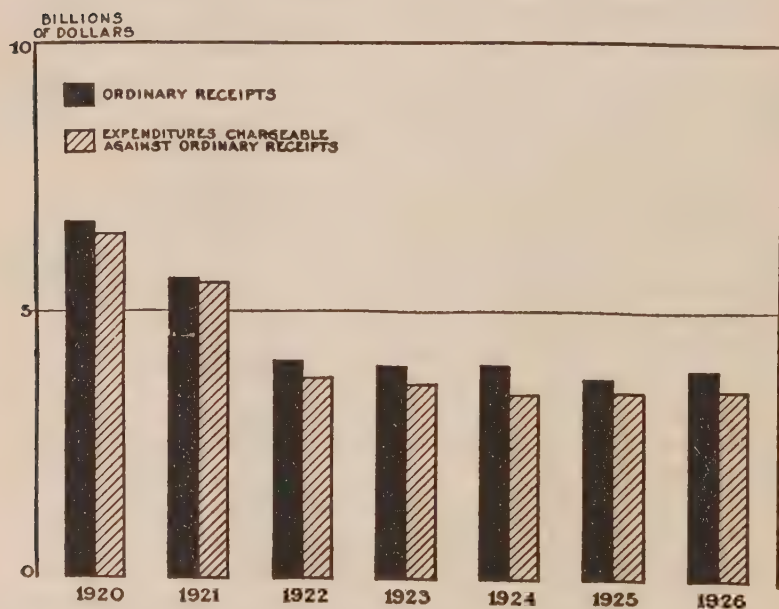
¹ Compiled from the *Annual Report of the Secretary of the Treasury* (1927), 423 ff. See C. P. White, "The Trend in Federal Expenditure," *Annals of Amer. Acad., Polit. and Soc. Sci.*, CXIII, 1-7 (May, 1924); J. L. Keedy, "Are We Spending Too Much for Government? The Trend of Federal Expenditure," *Nat. Mun. Rev.*, XVI, 246-250 (Apr., 1927).

496 INTRODUCTION TO AMERICAN GOVERNMENT

CHAP.
XXVII

Department of the Interior.....		299,812,014.53
Including, Army pensions.....	220,359,487.65	
Navy pensions	9,597,253.62	
General Land Office.....	11,938,724.78	
Agricultural colleges	2,550,000.00	
Bureau of Education.....	957,384.09	
Reclamation Service	3,772,473.42	
Department of Justice.....		24,757,808.34
Department of Labor.....		9,760,736.89
Including, Bureau of Immigration.....	6,447,496.75	
Bureau of Naturalization.....	724,031.35	
Children's Bureau	1,333,632.24	
Navy Department		322,620,723.27
Post Office Department.....		27,316,725.75
Department of State.....		16,513,990.34
Treasury Department		280,797,940.09
Including, Collection of Customs.....	17,263,677.85	
Collection of Internal Revenue.....	33,141,625.70	
Prohibition and narcotic laws enforcement	12,802,517.59	
Coast Guard	28,119,532.74	
Mint and Assay Office.....	1,554,262.79	
Public Health Service.....	9,028,632.14	
War Department		361,987,156.99
Including, Panama Canal.....	7,613,376.03	
Rivers and harbors.....	66,913,975.11	

ORDINARY RECEIPTS AND EXPENDITURES



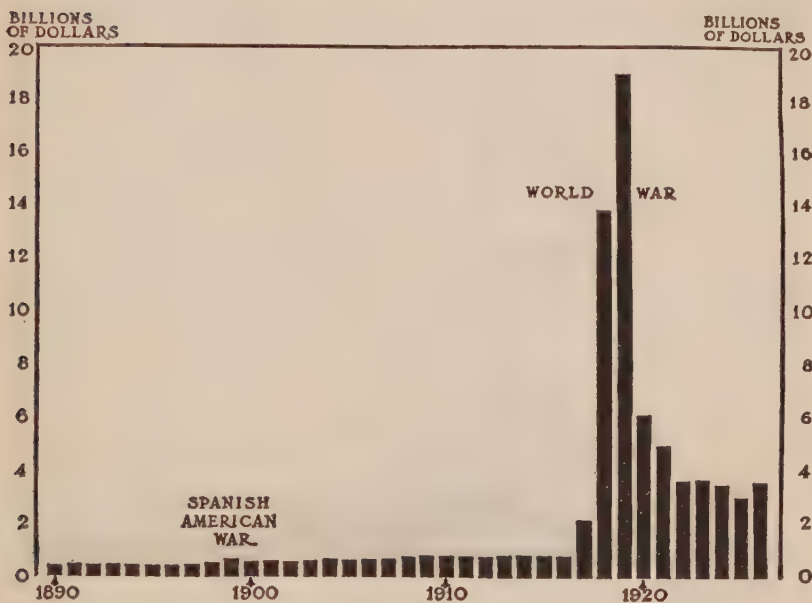
Ordinary receipts and expenditures chargeable against ordinary receipts for the fiscal years 1920 to 1926

Reproduced, by permission, from the *Annual Report of the Secretary of the Treasury* (1926), 35.

Not a dollar of the nation's huge annual income can be legally expended except by direct authority of Congress; and the passing of the great appropriation bills forms one of the most important tasks of that body in every session—almost, as a rule, the sole task in the short session. Some of these measures contain thousands of items and fill upwards of a hundred printed pages in the

CHAP.
XXVII
Congress
and
appropriations

EXPENDITURES, 1890-1926



Expenditures chargeable against ordinary receipts for the fiscal years 1890 to 1926.

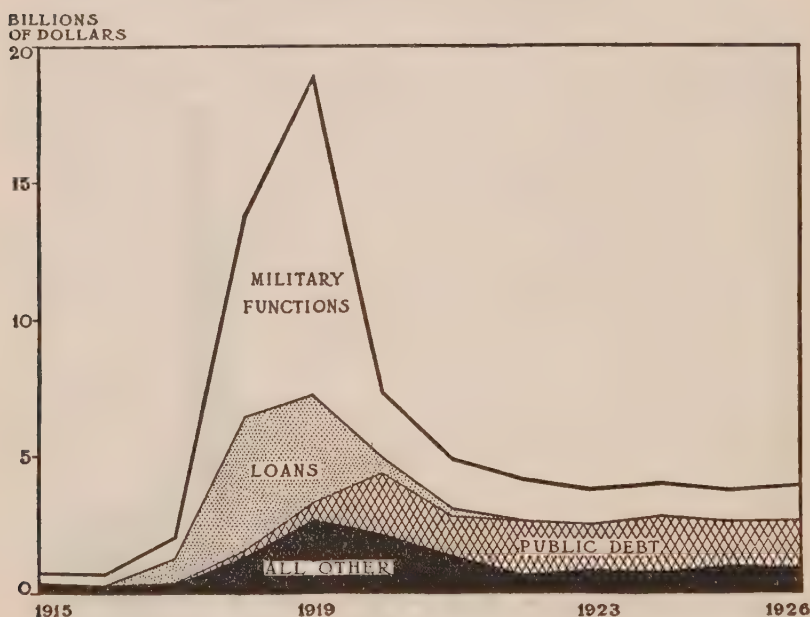
Reproduced, by permission, from the *Annual Report of the Secretary of the Treasury* (1926), 26.

Statutes at Large. For appropriations are made in great detail. In England, Parliament is content to vote lump sums and leave the administrative authorities to distribute the funds, including the fixing of salaries and wage-scales, largely at their discretion. In our own country, however, one of the chief means by which Congress exercises its exceptionally close control over administration is the detailed and specific allocation of money, cutting off an activity here by leaving it without financial support, adding an activity or agency there by making the necessary fiscal provision, and in these and other ways predetermining far more than

do most foreign parliaments the lines on which the government's work shall be carried on.¹

For a long time, appropriation bills were framed and reported, on the basis of estimates submitted by the secretary of the treasury, by the same committee in the House of Representatives that prepared revenue measures, *i.e.*, the ways and means committee,

MAIN CLASSES OF EXPENDITURES



Main classes of expenditures for the fiscal years 1915 to 1926

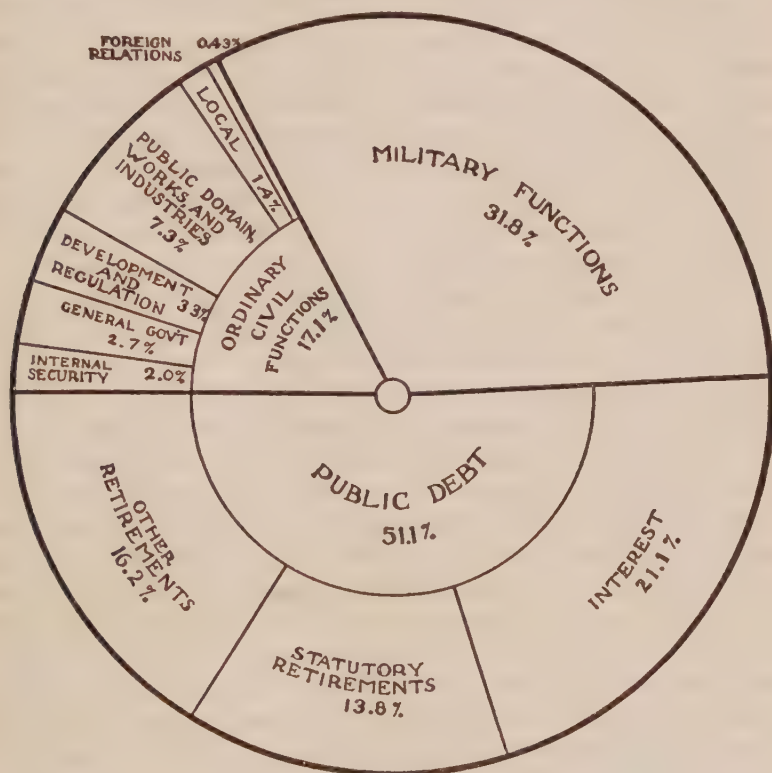
Reproduced, by permission, from the *Annual Report of the Secretary of the Treasury* (1926), 29.

which was raised from a select to a standing committee in 1802; and until 1823 a single annual appropriation bill met all needs. Gradually, however, appropriations came to be separately provided for in a number of distinct bills, and in 1865 a separate committee on appropriations was created. At first the new committee handled all appropriation bills, as had the ways and means committee before it. But soon it was urged that the various committees having jurisdiction of government activities for which appropriations were made should control the appropriation bills relating to the respective activities; and after 1880 no fewer than eight committees,

¹In France, however, detailed appropriations are made, very much as in the United States.

in addition to the committee on appropriations, received this right. Thus the post-office bill (the greatest of the appropriation bills) came to be prepared by the committee on post-offices and post-roads; the army bill and the navy bill were in charge, respectively, of the committees on military affairs and naval affairs; the agri-

FUNCTIONAL DISTRIBUTION OF EXPENDITURES



Functional distribution of expenditures, by percentages, for the fiscal year 1927

Reproduced, by permission, from the *Annual Report of the Secretary of the Treasury* (1927), 18.

cultural bill was the work of the committee on agriculture. The committee on appropriations retained jurisdiction, normally, over only the appropriations for executive, legislative, and judicial expenses, for sundry civil expenses, for fortifications and coast defenses, for the District of Columbia, for pensions, and for all deficiencies.¹

¹ Prior to the enactment of the budget law of 1921, fourteen separate appropriation bills were reported by these nine committees.

This division of labor was defended on the plausible ground that these specialized committees could obtain a better knowledge of what was needed in their respective fields than the general appropriations committee. But, unfortunately, the distribution of labor meant a division of responsibility which in a very short time justified the worst apprehensions of persons who had opposed the new arrangements. Under acts of 1789 and 1800, the secretary of the treasury presented annual estimates of expenditures. But these estimates were merely gathered up from the several departments and detached agencies and transmitted without revision. The head of each department prepared the estimates for his department without any reference whatever to those submitted by the heads of other departments, and without any reference whatever to the estimated revenues for the fiscal year. Similarly, after the splitting up of committee jurisdiction took place, each of the nine House committees which had power to report appropriation measures—not to mention five others which could report bills incidentally involving charges on the treasury¹—"acting independently, without restraint, and without regard either to its fair proportion or to the amount of available revenue, reported whatever it deemed desirable, apparently indifferent to an abnormal increase in appropriations or to the creation of a treasury deficit."² Quite unlike the English Parliament, which receives all proposals for appropriations from a single source, *i.e.*, the Treasury, and will not consider any such proposal which does not come with the cabinet's approval, Congress received, and usually adopted with little modification (except increases) proposals emanating originally from more than two score separate, and often rival, departments, commissions, and other agencies, and reported by more than a dozen different committees. Under these circumstances, "log-rolling" became a fine art, the "pork-barrel" an inexhaustible resource.

The upshot was a startling growth of public expenditures, whose effect was aggravated by frequent evidences of sheer extravagance and waste; and presently demand arose for reform.³ Many influ-

¹ In the Senate, appropriations, until recently, were handled by some fifteen committees.

² D. S. Alexander, *History and Procedure of the House of Representatives*, 250.

³ On mounting expenditures and the need for a budget system, see H. J. Ford, *The Cost of Our National Government* (New York, 1910); *Report of the Commission on Economy and Efficiency*, 62nd Cong., 2nd Sess., H. Doc. No. 851 (1912); T. E. Burton, "The Scandal of the Federal Appropriation

ences worked for change. The example of the English, French, Canadian, and other budget systems made strong appeal. Rapid progress of budgetary reform in the states had its effect.¹ Careful studies by such agencies as President Taft's Economy and Efficiency Commission and the privately endowed Institute for Government Research at Washington, leading to scientifically framed reports and the publication of scholarly books and a wealth of popular literature, gave the movement impetus. But the final push was supplied by the World War, whose costs, even to the United States, were such as to demand the adoption of every known expedient by which to lessen expenditures and make tax reductions possible. A national budget system had been talked about for twenty years; the war made it a practical necessity; and in 1921 it became a reality.²

The first budget bill passed by Congress, in the session of 1919-20, was vetoed by President Wilson on the ground that one of its clauses unconstitutionally limited the president's power of appointment by withholding the power of removal.³ But another measure became law soon after the opening of President Harding's administration. This budget and accounting act of 1921⁴ created two important bureaus—the general accounting office and the bureau of the budget. The primary purpose of both is the same, namely, to save money for the taxpayers by economy in planning future expenditures, by economy in spending funds already appropriated, and by increasing efficiency in administrative organization and procedure.⁵

The general accounting office is made independent of the executive departments and is under the direction and control of the comptroller-general of the United States, appointed by the presi-

CHAP.
XXVII

Budget and
Accounting
Act, 1921

General
accounting
office

Bills," *World's Work*, XXV, 438-443 (Feb., 1923); B. J. Hendrick, "Shall We Have Responsible Government?" *ibid*, XXXI, 189-202, 273-285 (Dec. 1915-Jan., 1916); H. L. Stimson, "A National Budget System," *ibid*, XXXVIII, 371-375, 528-536 (Aug.-Sept., 1919); C. C. Maxey, "A Little History of Pork," *Nat. Mun. Rev.*, VIII, 691-701 (Dec., 1919); W. F. Willoughby, *The Problem of a National Budget* (New York, 1918); series of articles in *Acad. Polit. Sci. Proceedings* IX, No. 3 (July, 1921).

¹ See Chap. XI in the complete edition of this book.

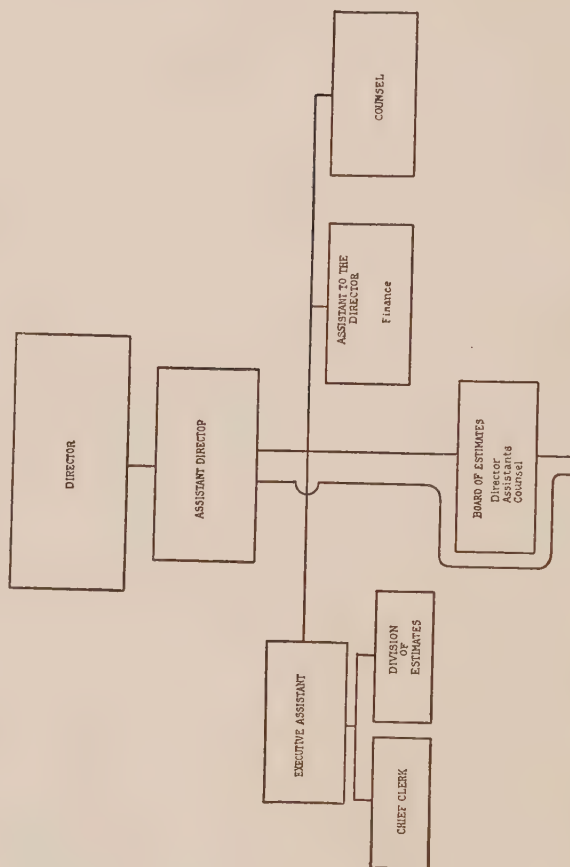
² A brief history of the movement for a budget system is given in *Amer. Year Book* (1925), 317-321.

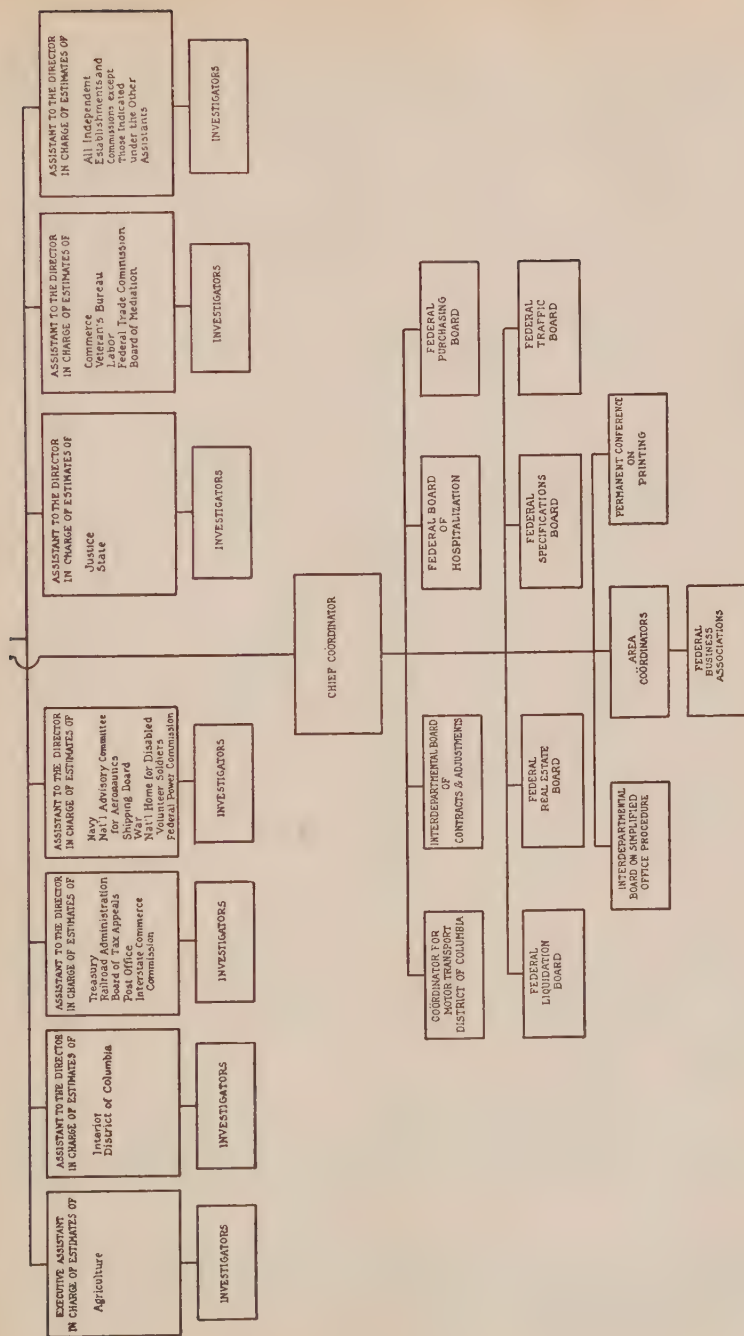
³ T. R. Powell, "The President's Veto of the Budget Bill," *Nat. Mun. Rev.*, IX, 538-545 (Sept., 1920).

⁴ *U. S. Compiled Statutes* (1923), pp. 8-12; *Code of the Laws of the U. S.* (1926), pp. 975-981.

⁵ See W. P. Helm, Jr., "The New Guard at the Public Purse," *Outlook*, CXXXI, 715-717 (Aug. 30, 1922); R. A. Lewis, "How the Government Budget Works," *World's Work*, XLIII, 513-519 (Mar., 1922).

ORGANIZATION OF THE BUREAU OF THE BUDGET





Courtesy of General H. M. Lord, Director of the Bureau of the Budget.

dent and Senate for a term of fifteen years. Further to emphasize the comptroller-general's independence, he is made removable only by impeachment or, for cause, by joint resolution of Congress, after notice and hearing. To this office has been assigned auditing and bookkeeping duties formerly performed by various officials connected with the Treasury Department; and the new law provides for an audit of government accounts quite independent of the spending departments or agencies whose transactions are under scrutiny. Under ordinary circumstances the work of the office is purely routine and devoid of the spectacular, and thus far it has attracted little public attention or interest. It is, none the less, service of the first importance, and can be made to contribute much to the economy and efficiency of our national administration.¹

This is due, in part, to the fact that the Budget and Accounting Act empowered the comptroller-general to conduct investigations, of all matters relating to the receipt, disbursement, and application of public funds, and report his recommendations to the president and Congress. Furthermore, he has been granted the highly important power to inaugurate a reform in the methods of accounting used by the various departments, which, if exercised, might easily give our government a method of bookkeeping unexcelled in any other country. Unfortunately, however, little use has been made of this authority to eliminate the "archaic and ridiculous" system which has grown up in the past hundred years. The bookkeeping methods of the different departments are still decentralized, and in their present form, says a competent critic, "furnish little aid to the executive or to his agent, the director of the budget, in determining the relative operating efficiency and cost of the departments. They operate also to keep Congress uninformed. The present system of government bookkeeping would not be tolerated for a day in a properly conducted private business enterprise. . . ." ²

Budget
bureau

Far more public attention has been bestowed upon the organization and work of the budget bureau. At the bureau's head is the director of the budget, who enjoys even greater immunity from congressional influence than the comptroller-general, since he

¹ See O. R. McGuire, "Legislative or Executive Control over Federal Funds," *Illinois Law Rev.*, XX, 455-474 (Jan., 1926); W. F. Willoughby, *The Legal Status and Functions of the General Accounting Office of the National Government* (Baltimore, 1927).

² Gen. C. G. Dawes, in *Amer. Bar Assoc. Jour.*, XIII, 697-698 (Dec., 1927); and *U. S. Daily*, Dec. 27, 1927, p. 3056.

is appointed by the president alone, and for an indefinite term.¹ He likewise has complete freedom from control by any of the executive departments; for, although the bureau is nominally attached to the Treasury Department, it is, in all essential points, an independent agency responsible only to the chief executive. As the personal agent of the president, the director of the budget is clothed with extraordinary powers; in matters of finance, for example, he may overrule members of the cabinet, and if he is sustained by the president, his decision is final. Subject likewise to presidential approval, the director's word is law for every bureau, board, commission, or department of the government as to what expenditures shall be recommended to Congress and what ones shall not.² This phase of the budget act has made the president, through the director of the budget, virtually the general business manager of the government. The budget bureau prepares for him the budget and any supplementary or deficiency estimates that may be necessary; and, to this end, the bureau has been given authority "to assemble, correlate, revise, reduce, or increase the estimates of the several departments or establishments."³ With this information before him, the president is in a position to submit annually to Congress (1) detailed estimates of the appropriations necessary for the support of the various branches of the government; (2) a statement of the probable revenues; (3) recommendations for the disposition of an estimated surplus or for meeting an anticipated deficit; and (4) all essential facts pertaining to the bonded and other indebtedness of the government.⁴ Thus under the new budget

¹ The comptroller-general and the director of the budget each receive a salary of \$10,000.

² "The isolation between departments is broken. Cabinet officers are at the beck and call of a subordinate of one of them, whose orders take precedence over their own, in their own departments. . . . If an admiral stands on his dignity and refuses to obey orders except from his superior officers, the budget director fills out a blank order already signed by the president and hands it to him. If the budget director thinks that the treasurer of the United States ought to change his century-old way of keeping books, he tells him so in a public speech, in the presence of all the departments. These are not fanciful hypotheses. Each of these incidents actually happened." C. H. Rowell, "The Next Step in Washington," *World's Work*, XLIX, 162 (Dec., 1924).

³ Brief descriptions of the various steps in the preparation of the budget may be found in *Amer. Year Book* (1926), 310-315; H. P. Seidemann, "The Preparation of the National Budget," *Annals of the Amer. Acad. of Polit. and Soc. Sci.*, CXII, 40-50 (May, 1924).

⁴ Not the least important of the functions of the budget bureau is studying the organization and operation of all administrative agencies and reporting to the president its recommendations as to the regrouping of agencies, their internal reorganization, and such other changes as may add to their efficiency. Cf. pp. 508-509.

system all estimates come to Congress as parts of a carefully coordinated fiscal plan, for which the president assumes full responsibility—a striking contrast to the *mélange* of independent appropriation proposals formerly unloaded upon that body by its various committees. Indeed, as now submitted, “the budget presents one of the clearest general financial reports of the operations of a government that is available for any government, either in the United States or in foreign countries.”¹

To ensure that the president's recommendations will be the real basis of congressional appropriations, it became necessary slightly to reorganize the committee system. Consequently, in 1920, even before the budget law was passed, the House appropriations committee was enlarged to thirty-five members,² and was granted jurisdiction over all appropriation measures, with the further provision that the preparation of specific measures might be assigned to fifteen sub-committees.³ That part of the annual budget which relates to appropriations is now, therefore, referred *in toto* to the appropriations committee; all appropriation bills arising out of it, while prepared by sub-committees, are reported by the general committee; and no other committee may introduce any measures of the kind. Corresponding changes in Senate committees took place in 1924.⁴

The new system has been in operation for too brief a period to permit a full appraisal of its workings. Much remains to be done before the best results can be looked for. (1) It is highly desirable, if not essential, that members of the cabinet and the director of the budget be given seats in Congress, where they may appear to explain and justify the various items contained in the budget. (2) It is essential that Congress adopt a self-denying ordinance or

¹ H. P. Seidemann. *op. cit.* For the president's budget message, December, 1927, see *U. S. Daily*, Dec. 8, 1927, pp. 2867 ff. A summary appears in the *Congressional Digest*, VII, 10 (Jan., 1928).

² In 1927, the House committee consisted of twenty-one majority and fourteen minority members; the Senate committee, of ten majority and eight minority members.

³ “. . . The appropriation bills have been reorganized and reformed. The old bills . . . have either been abolished or revamped. They were illogical, unscientific and confusing. The appropriations for a single department were often found in many different bills. The War Department formed the worst illustration of this diffusion . . . its funds being found in no less than five different measures. The new bills . . . are arranged according to departments and other units of organization. All of the appropriations for a given department are to be found in one bill or segregated as a part of a bill. . . .” Hon. M. B. Madden, chairman of the House committee on appropriations, in *Congressional Record*, June 30, 1922.

⁴ For a summary of these committee changes, see *Amer. Polit. Sci. Rev.*, XVIII, 84-88 (Feb., 1924).

rule—similar to that under which the British House of Commons has been working for two hundred years—whereby the houses shall agree not to increase any appropriation asked for, or consider any new appropriations not requested by the president, but shall, instead, confine themselves to criticizing, reducing, or striking out items prepared and submitted by the executive. The need for this was demonstrated in 1923 when the House, in opposition to the recommendation of both the budget bureau and of its own committee on appropriations, added twenty-nine million dollars to the army bill for river and harbor work; and the Senate accepted the amendment.¹ (3) If Congress is unwilling to take such a step, a constitutional amendment should be adopted permitting the president to veto separate items in appropriation bills, as a means of overcoming the well-known tendency of the houses to pass unnecessary or extravagant appropriations. Granting the item veto to the president would be no revolutionary step; it is already possessed by the governors of all but ten states.²

Despite these shortcomings, large economies have been effected since the inauguration of the budget system in 1921. It should be remembered, however, that such a result is by no means insured by the mere enactment of a budget law and setting up of a budget bureau. The needed inspiration and pressure to make the system effective in checking waste and promoting efficiency must come from above—from a president and a budget director who are themselves whole-heartedly devoted to the cause of governmental economy. Fortunately, executives of that type have been in office during the formative period of the new budget system. Under the energetic administration of the first director of the budget and his able successor³ not only have departmental estimates been scrutinized,

Economies
under the
budget
system

¹ *Amer. Polit. Sci. Rev.*, XVIII, 88 (Feb., 1924). In fairness to Congress, however, the following facts should be noted: "During the period of four years (1923 to 1926 inclusive) the House committee on appropriations cut down the estimated requirements for appropriations, as submitted by the president, \$633,000,000. Although on the floor the House membership increased the amounts recommended by the committee \$65,000,000, there was still a net reduction on the part of the House of \$568,000,000. The Senate, however, increased the amounts appropriated by bills coming from the House \$337,000,000, but as the bills were finally passed they were under the combined budgets of these years, as submitted by the president, \$334,000,000." F. A. Cleveland, in *Amer. Year Book* (1926), 314.

² See Chap. XXXVIII of the complete edition of this book.

³ The first director of the budget was Gen. C. G. Dawes, whose book, *The First Year of the Budget in the United States* (New York, 1923), is a most interesting account of the problems met and solved from day to day in inaugurating the new system. The present director of the budget is Gen. H. M. Lord.

and revised downward perhaps as never before, but it has been made the business of the budget bureau to study in minute detail the ways in which the government's money is spent and to introduce more economical methods of handling governmental business.

With these ends in view, the bureau of the budget has created numerous auxiliary bodies, called coördinating agencies, such as the federal purchasing board, to bring about consolidation, or a greater measure of centralization, in the purchasing of governmental supplies and equipment; the federal liquidation board, to assist in the reduction of war-time stocks of surplus property; a federal specifications board and an interdepartmental board of contracts and adjustments, to revise and standardize specifications for government supplies and contracts for government construction work. In addition, the budget bureau has organized a federal communications service, a permanent conference on printing, an interdepartmental board on simplified office procedure, a federal real estate board, a board of hospitalization, a traffic board, and a board for the coördination of motor transportation in the District of Columbia.

While some of these coördinating agencies function wholly, or mainly, in Washington, the possibilities for increased economy and efficiency in the field services scattered over the country have not been overlooked. The country has been divided into nine large geographical areas and a sort of "professional dollar-saver," called a coördinator, has been placed in charge of each. These areas are subdivided into a number of active or potential coördinating zones. In each of the active zones, which now (1928) number upwards of 250, there is a federal business association serving as the coördinating unit for the zone. These associations are composed entirely of federal employees, who hold regular meetings. Their sole purpose is to promote economy and efficiency in the conduct of public business in their respective localities. The work of converting the potential zones—where business organizations have not yet been formed—into active zones is progressing rapidly.¹

Then, periodically, in January and June of each year, is held, after the manner of any well-managed business concern, a meeting of all the executive heads of the various departments and bureaus of the government, called the Business Organization of the Govern-

¹ The story of the savings effected by the various coördinating bodies, as set forth in the annual reports of the director of the budget, makes highly interesting reading. These reports may be obtained from the Superintendent of Documents, Washington, D. C.

ment. This meeting is addressed by the president and the director of the bureau of the budget, who discuss at length the business operations of the government on the side of conservation and expenditure of revenue, the progress made in introducing economy and efficiency since the preceding meeting, and plans for the future. It is intended to be both an informational and an inspirational occasion, and as such it deservedly attracts wide attention and is reported at length in the leading newspapers.¹

CHAP.
XXVII

Through this widely ramifying organization, the new budget system has developed into a most effective instrumentality whereby the president may hold in leash the several spending agencies of the government.² At the same time it enables a president and Congress that are so minded to strangle or starve deserving administrative services in the interest of tax reduction. And during the brief period since 1921, Congress has more than once shown a disposition to vote more generous appropriations to meet the demands of local constituencies for public buildings, local improvements, bonuses, and grants-in-aid than for the upbuilding or enlargement of certain highly useful, but non-political, administrative agencies.³

The
budget as
an instru-
ment of
control

In ordinary times, and for ordinary undertakings, the income derived from taxation and from fees, services, and other miscellaneous sources suffices to meet the government's needs; at all events, deficits of one year are apt to be offset by surpluses of another. In times of war, however, or other unusual strain, such as a period of business depression, or to meet the cost of some great public work, like the Panama Canal, the government is obliged to resort to borrowing; and the accumulated obligations thus incurred give rise to the national debt. The power to borrow money is expressly granted to Congress in the constitution, being indeed one of the very few powers conferred absolutely without restriction.⁴ The United States operates under no debt limit, such as is fixed for many of the states in their constitutions, and such as states commonly establish for counties, cities, and towns. Congress may borrow for any purposes whatsoever, in any amount, and on any terms,

Borrowing
money

¹ A popular account of the meeting held in June, 1926, is C. C. Hathaway, "America Hears the Gospel of Economy," *N. Y. Times*, June 20, 1926; see also *Literary Digest*, XC, July 3, 1926, pp. 8-9, "Making Our Dollars Sweat." The addresses of the president and director of the budget at the meeting in January, 1928, are reported in full in the *N. Y. Times* and the *U. S. Daily*, Jan. 31, 1928.

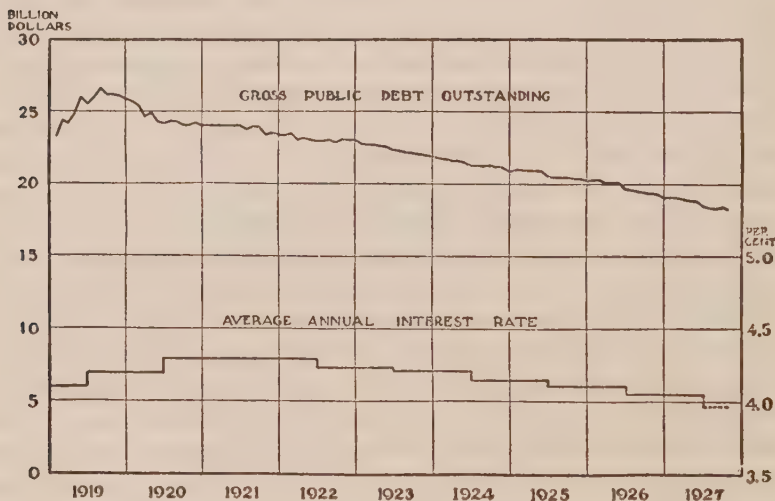
² C. O. Sherrill, "Czaristic Tendencies of the National Budget System," *Nat. Mun. Rev.*, XV, 141-142 (Mar., 1926).

³ F. A. Cleveland, "National Budget," in *Amer. Year Book* (1926), 314.

⁴ Art. I, § 8, cl. 2.

and it may provide or fail to provide for the repayment of the loan, with or without interest. The method of borrowing is usually a sale of interest-bearing bonds or treasury certificates to banks, corporations, and private citizens. Never since Revolutionary times has the government been under the absolute necessity of looking abroad for money; although on a few occasions, notably in the Civil War, it has done so, and, of course, its securities were to be found, prior to the World War, in the hands of foreign, as well

THE PUBLIC DEBT



Gross public debt outstanding and average annual interest rate from January, 1919, to October, 1927

Reproduced, by permission, from the *Annual Report of the Secretary of the Treasury* (1927), 34.

as domestic, investors. On the eve of our entrance into this war, in 1917, the national debt amounted to about a billion dollars; in 1917-18 alone, some twenty billions were borrowed, chiefly by means of the familiar "Liberty" bond issues; and in 1919 the total indebtedness exceeded twenty-five and a quarter billions. By June 30, 1927, however, the sum had been reduced to slightly more than eighteen and one-half billions.¹

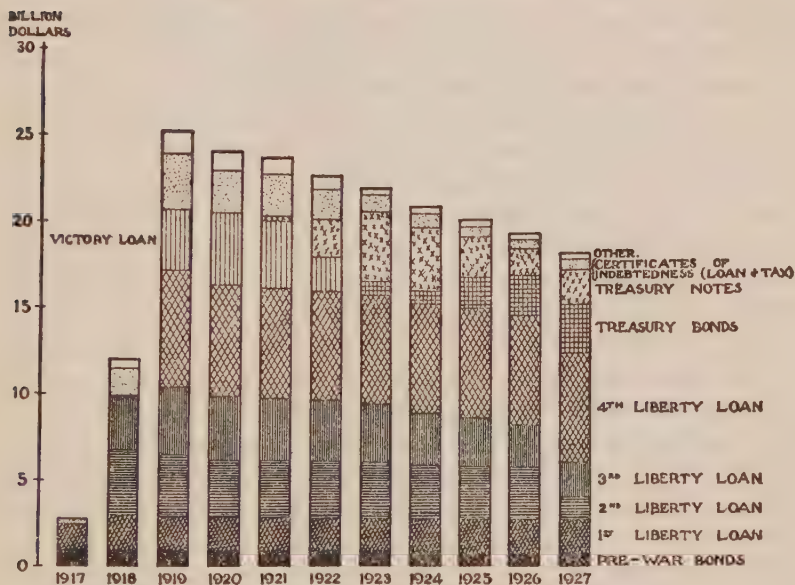
Mainly to facilitate the sale of government bonds on favorable terms during the Civil War, our present system of national banks was created by act of Congress in 1863. Before that, the government had established two great banking institutions, each oper-

¹ See W. M. Kiplinger, "Managing the Public Debt," *N. Y. Times*, Jan. 3, 1926.

ating under a charter granted by an act of Congress, in 1791 and 1816 respectively, for a period of twenty years. Each of these banks assisted the government in collecting national revenues, served as a depository of public funds, lent money to the government from time to time, and was empowered to issue bank notes which served as paper money. The history of the first of these banks was comparatively uneventful. The career of the second one was, however,

CHAP.
XXVII

FORMS OF INTEREST-BEARING DEBT



Interest-bearing debt outstanding at the end of each fiscal year from 1917 to 1927, by type of issue

Reproduced, by permission, from the *Annual Report of the Secretary of the Treasury* (1927), 35.

marked by grave mismanagement in earlier years, and only after reorganization and under new management did the institution enter upon a period of confidence and success.¹ Even at that, long before its charter expired, it incurred the hostility of rival state banks, which successfully played upon the widespread prejudice then existing against corporations of all kinds, and the question of renewing the bank's charter became the leading issue in the presidential campaign of 1832. Henry Clay, who championed the bank,

¹ Its history is fully set forth in R. C. H. Catterall, *The Second Bank of the United States* (Chicago, 1903). See also R. C. McGrane [ed.], *The Correspondence of Nicholas Biddle* (Boston, 1919).

was overwhelmingly defeated by President Jackson, the avowed enemy of the institution, who had previously vetoed a bill renewing the charter. Thereupon the bank proceeded to wind up its affairs, and in 1836 it ceased to do business as a national institution.

The Supreme Court's decision in the celebrated case of *McCulloch v. Maryland* in 1819¹ established permanently, and put practically beyond question, the power of Congress to create banking corporations. From the time, however, when the second Bank of the United States closed its doors in 1836 until the Civil War, Congress did not avail itself of its right to establish a national banking system. Such banking institutions as existed in this period of upwards of thirty years were created under widely varying state laws, and such paper currency as there was in the country consisted wholly of notes issued by these state and local banks. Naturally the amount of such money fluctuated greatly from time to time; and its value, depending not only on the quantity issued but also on the resources and reputation of the institutions behind the notes, varied widely, both from state to state and in different parts of the same state. One of the principal reasons, therefore, for the creation of a national banking system in 1863, in addition to the desire to provide a market for government bonds, was to supplant these heterogeneous bank notes with a currency resting upon national authority, backed by the resources of the nation, and enjoying a uniform value throughout the country. With this end in view, Congress passed the national banking acts of 1863 and 1864, which constitute the legal foundation of the present system of national banks.² The new banks were empowered to issue notes designed to circulate as money; and, in order to drive out of circulation the rival notes of state banks, the latter were subjected to a ten per cent tax, which no bank could afford to pay. Indirectly, therefore, the new banks were given a monopoly of the right to issue notes, a privilege which they enjoyed uninterruptedly until the creation of the federal reserve system in 1913.³

A half-century of experience with this national banking system

¹ See pp. 129-130.

² *U. S. Compiled Statutes* (1918), 1562-1580; *Code of the Laws of the U. S.* (1926), pp. 259-273. The number of national banks in existence June 30, 1927, was 7,844.

³ Since 1913 the federal reserve banks have also issued notes. Indeed when the federal reserve system was created it was expected that the national bank notes would soon be retired and their places taken by federal reserve notes. Owing in part to the World War, however, large amounts of national bank notes are still in circulation. See *Annual Report of the Secretary of the Treasury* (1927), 169, 262-263.

showed that although it had many and obvious merits, the provisions of the law were too rigid in several respects, and, in times of business depression, positively harmful. For example, the amount of notes which a bank could issue was regulated by a hard and fast rule, based upon the amount of United States bonds which the bank owned and kept on deposit with the comptroller of the currency in Washington. This worked in such a way that when business was brisk, demanding a large volume of notes for its transactions, bonds would be too high in price to be profitably purchased by the banks as a basis for additional note issues; indeed, high prices might have just the opposite effect and lead banks to sell their government bonds, and thus actually reduce their note circulation. Note issues were thus inelastic and not responsive to commercial needs. There was a corresponding inelasticity of credit, even for borrowers who could offer perfectly good security. This was traceable in part to the defect just mentioned, in part to the rigid requirements regarding reserve funds, and in part to restrictions which prevented national banks from lending money on real estate mortgages. All these, and some minor, defects were clearly revealed in the "panic" of 1907, and eventually resulted in the passing of the act of 1913 creating the federal reserve system.¹

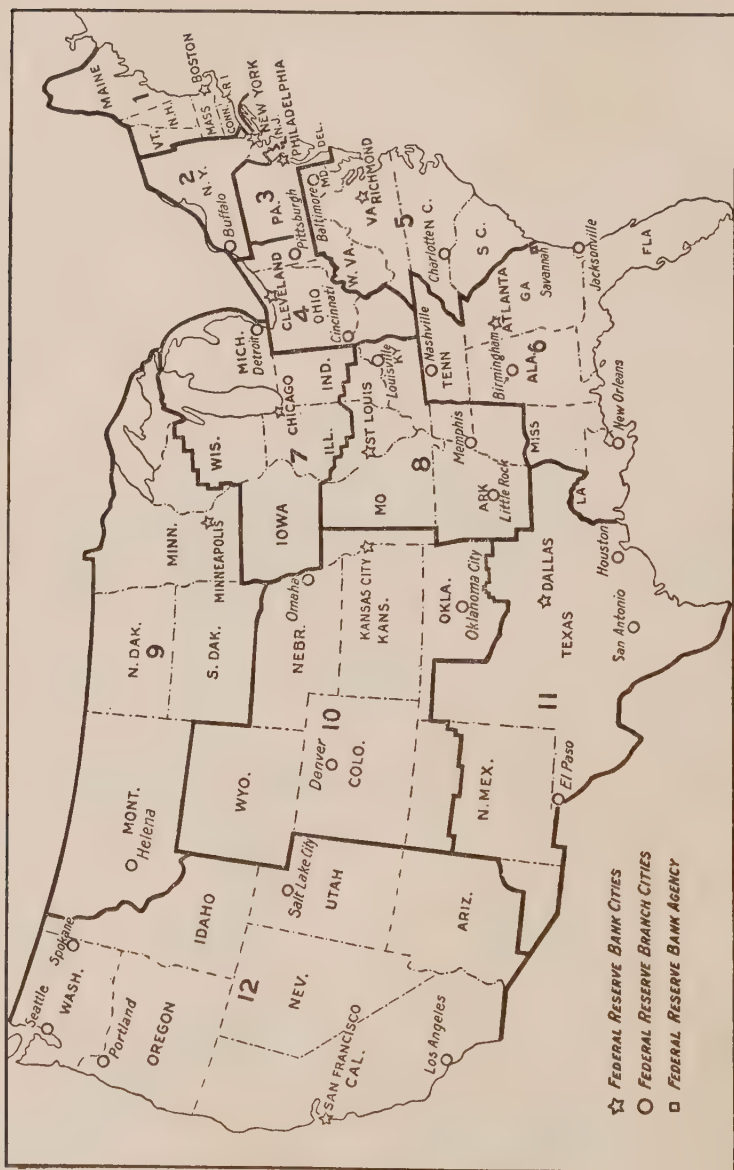
By this law the country is divided into twelve great districts in each of which there is a federal reserve bank, commonly located in the district's principal city.² Unlike the national and state banks, these federal reserve banks do no business directly with the general public, but only with the "member banks," comprising all the national banks of the district and such state banks as have voluntarily become members of the federal system. The reserve banks obtain their funds in part from the member banks, which are obliged to maintain certain reserves with the reserve bank of their district, and also by serving as the legal depositories of the funds belonging to the national government. Their capital stock (not less

CHAP.
XXVIIDefects
of the
systemFederal
reserve
system,
1913

¹ *U. S. Compiled Statutes* (1918), pp. 1581-1594; *ibid.* (1923), pp. 631-650; *Code of the Laws of the U. S.* (1926), pp. 273-289. See H. P. Willis, "The Federal Reserve Act," *Amer. Econ. Rev.*, IV, 1-24 (Mar., 1914), and "The New Banking System," *Polit. Sci. Quar.*, XXX, 591-617 (Dec., 1915); J. L. Laughlin, "The Banking and Currency Act of 1913," *Jour. Polit. Econ.*, XXII, 293-318, 405-435 (April and May, 1914); E. E. Agger, "The Federal Reserve Systems," *Polit. Sci. Quar.*, XXIX, 265-281 (June, 1914); T. H. Price, "The Amended Federal Reserve Law," *Outlook*, CXVI, 476-478 (July 25, 1917). On the congressional history of the Federal Reserve Act, see *Amer. Year Book* (1913), 38-53.

² The federal reserve cities are Boston, New York, Philadelphia, Cleveland, Richmond, Atlanta, Chicago, St. Louis, Minneapolis, Kansas City, Dallas, and San Francisco.

THE FEDERAL RESERVE SYSTEM



Courtesy of the Federal Reserve Board.

than \$4,000,000) is subscribed by the national and state banks in the district, or, in a few cases, by the national government and the general public. National banks are now allowed to issue, in addition to their notes based on government bonds, other notes based on such resources as currency, securities, and commercial paper deposited with the federal reserve bank of their district. The amount of such reserve fund, however, is not rigidly prescribed as formerly, but may be adjusted to meet general or local business conditions, and also the character of the management as well as the resources of individual banks. These arrangements, together with more elastic provisions regulating the acceptance, discount, and re-discount of commercial paper, have done much to impart increased flexibility to credit. In 1927 Congress passed an act extending indeterminately the charters of federal reserve banks (which otherwise would have expired in 1934), authorizing national banks to establish branches in states where state banks are allowed to do so,¹ and in various other ways enlarging the powers of the national banks.²

CHAP.
XXVII

Unification of the federal reserve and national banking systems throughout the country is secured through a central body, called the Federal Reserve Board, consisting of the secretary of the treasury and the comptroller of the currency *ex officio*, and six other salaried members appointed by the president and Senate for ten-year terms.³ The head of the board bears the title of governor. In the hands of this body have been placed the supervision and control of the entire federal reserve system of the country and some measure of control over the national banks as well ⁴—a sum total of power which enabled it to play an exceedingly important part in stabilizing financial conditions during the World War and

Federal
Reserve
Board

¹ These branches may not be established outside the bank's home city. No branches may be established in cities of less than 25,000 population; only one branch in cities of between 25,000 and 50,000 population; two in cities of from 50,000 to 100,000 population; and in cities of more than 100,000 the number of branches is to be determined by the comptroller of the currency.

² See *Annual Report of the Secretary of the Treasury* (1927), 86-87; *Congressional Digest*, V, 79-99 (Mar., 1926); "The New Federal Banking Law," H. H. Preston, "The McFadden Banking Act," *Amer. Econ. Rev.*, XVII, 201-218 (June, 1927); H. H. Preston, "Recent Developments in Branch Banking," *ibid.*, XIV, 443-462 (Sept., 1924).

³ Originally there were seven members of the Board, but in 1922 the number was raised to eight in order to provide direct representation of the agricultural interests. Salaries are fixed at \$12,000.

⁴ The comptroller of the currency continues to have some supervisory power over the national banks. See J. G. Heinberg, "The Office of Comptroller of the Currency," *Service Monographs*, No. 38 (1926).

the years of readjustment immediately following the armistice.¹ The federal reserve bank in each of the twelve districts is controlled by nine directors, three appointed by the Federal Reserve Board—one of whom is designated as the federal reserve agent and is chairman of the board—and six chosen by the “member banks,” each bank having one vote. Of the six directors so chosen, three may be bankers, but three must be actively engaged in business or agriculture. The governor of each federal reserve bank is chosen by the directors and is the executive head.

The national banks and the federal reserve system have been developed primarily to meet the needs of the commercial and industrial classes. It was not until 1916 that the national government undertook to provide special credit and banking facilities for the agricultural sections of the country. In that year and in 1923 two important acts² were passed for their benefit. The farm loan act of 1916 divided the country into twelve districts, each containing a federal land bank, located in an important city.³ Practically all of the original capital of these banks was subscribed by the national government. The land banks lend money, not directly to individual farmers, but to organized groups called national farm loan associations, which in 1927 numbered 4,667; and it is part of the plan that these associations shall ultimately own the banks' capital stock. The combined capital stock of all federal land banks on June 30, 1927, amounted to \$60,574,983, of which \$59,060,420 was owned by national farm loan associations, \$672,555 by individual borrowers, and only \$842,008 by the national government.⁴ Bonds are issued by the banks, based on farm mortgages secured by the credit of the local loan associations or by United States bonds; and these securities are guaranteed by all the land banks. The act of 1916 also authorized the formation of joint-stock land banks, the shareholders of which are made individually responsible for the bank's obligations. The capital stock is subscribed wholly by private individuals. Otherwise these banks enjoy about the same privileges and

¹ See H. L. Reed, “The Recent Work of the Federal Reserve Administration,” *Amer. Econ. Rev.*, Supp., XVI, 303-315 (Mar., 1926).

² *U. S. Compiled Statutes* (1918), pp. 1599-1615; *ibid.* (1923), pp. 650-656; *Code of the Laws of the U. S.* (1926), pp. 296-326. On the constitutionality of these laws, see *Smith v. Kansas City Trust Co.*, 225 U. S., 180 (1921).

³ These cities are Springfield, Mass., Baltimore, Md., Columbia, S. C., Louisville, Ky., New Orleans, La., St. Louis, Mo., St. Paul, Minn., Omaha, Neb., Wichita, Kan., Houston Tex., Berkeley, Cal., and Spokane, Wash.

⁴ *Annual Report of the Secretary of the Treasury* (1927), 76.

perform about the same functions as the federal land banks.¹ With a view to exempting the bonds issued by these different banks from state and local taxation, they are designated by law as "instrumentalities of the government of the United States."

CHAP.
XXVII

All loans made by either the federal land banks or the joint-stock land banks are based upon real-estate mortgages. The agricultural credits act of 1923 went farther and sanctioned loans to individuals or to coöperative marketing associations based upon live-stock and farm produce on the way to market. Twelve federal intermediate banks were authorized with a paid-up capital of \$2,000,000, subscribed in part, at least, by the national government.² The administration of these two acts, including the detailed supervision of the land and credit banks and the farm loan associations, is vested in a federal farm loan bureau. This, in turn, is presided over by the Federal Farm Loan Board, consisting of the secretary of the treasury, *ex officio* chairman, and six other salaried members appointed by the president and Senate for a term of eight years.³ The president designates one member of the board to be its executive head, with the title of farm loan commissioner. The act of 1923 also authorized the organization of national agricultural credit corporations, with a paid-up capital of not less than \$250,000, for the purpose of providing additional credit facilities for the agricultural and live-stock industries. These corporations are placed under the supervision of the comptroller of the currency.⁴

Intermedi-
ate credit
banks

One other important phase of national finance calls for brief consideration, namely, the currency. Prior to the Revolution, the colonies were not forced by any controlling hand to adopt uniform monetary laws; and as a result English, French, Spanish, and even German, coins of various and uncertain values passed from hand to hand. The same confusion characterized the metallic money of the Revolutionary period and constituted a serious obstacle to

The
currency

¹ In 1927 there were 54 joint-stock land banks, operating in every state except Delaware, Florida, New Mexico, Montana, and the New England states. See W. S. Holt, "The Federal Farm Loan Bureau," *Service Monographs*, No. 34 (Baltimore, 1924). An elementary explanation of the system is G. W. Norris, "The Farm Loan Bill in Words of One Syllable," *Outlook*, CXIV, 69-87 (Sept. 13, 1916).

² Each of these is located in a federal land-bank city. *Code of the Laws of the U. S.* (1926), pp. 315-319.

³ Salaries are fixed at \$10,000.

⁴ *Code of the Laws of the U. S.* (1926), pp. 319-326; V. A. Valgren, "The Agricultural Credits Act of 1923," *Amer. Econ. Rev.*, XIII, 442-460 (Sept., 1923).

CHAP.
XXVIIChaotic
condition
before 1789

trade, while affording endless opportunities for fraud and extortion. Even the Articles of Confederation did little to improve a situation which was rapidly becoming intolerable when they went into effect. Congress, to be sure, was given power to regulate the alloy and value of coins struck either by its authority or by that of the states. But only a limited amount of money was coined by the national government, and the latter's control over state coinage amounted, in practice, to little. To the confusion arising from this situation was added the chaos produced by voluminous and rapidly depreciating issues of paper money. Prior to 1776 the restraining hand of the home government tended to keep such issues within bounds. But when this influence was removed both the states and the Continental Congress began pouring forth issue after issue of paper largely or entirely unsupported by specie. By 1781 the country was financially demoralized; by 1787 business could hardly be carried on at all.¹ It is therefore not surprising that the framers of the constitution decided to put into that instrument provisions adequate to ensure a uniform national currency; and to this end Congress was expressly granted authority to "coin money [and] regulate the value thereof,"² while at the same time the states were forbidden to coin money, emit bills of credit, *i.e.*, paper money, and make anything but gold and silver coin legal tender in the payment of debts.³

In pursuance of the power given it, Congress enacted, in 1792, the first law providing for a truly national currency. Following the recommendations of Alexander Hamilton, secretary of the treasury, it adopted the now familiar decimal system of values instead of the cumbersome English system. At the same time, it authorized the use of both gold and silver coins, which became a fixed feature of our monetary system.

Subsequently—notably in the decade after the Civil War and in the closing decade of the century—the power expressly granted to Congress to "coin money" and to "regulate the value thereof" gave rise to important currency questions in our national politics, especially in the form of "greenbackism" and a demand for the free and unlimited coinage of silver. The latter proposal raised no controversy as to constitutional authority; the question was simply one of wisdom and expediency. But the "greenback" issue in-

Paper
money

¹ For a graphic account, see J. Fiske, *Critical Period of American History*, 163-186.

² Art. I, § 8, cl. 5.

³ Art. I, § 10, cl. 1.

volved grave questions of constitutional law. Until the Civil War, the only paper currency in the country, as has been pointed out,¹ consisted of state bank notes and the notes issued by the first and second banks of the United States during the periods 1791-1811 and 1816-1836. To meet the emergency created by that conflict, Congress passed several acts authorizing the issuance of paper money and making the new currency legal tender for the payment of private debts. Inasmuch as the constitution contains no clear grant of power for such legislation, and since it was known that the framers of that instrument definitely rejected a proposal to include such authorization among the powers expressly granted, it was not long before the right of Congress was challenged in the courts, and eventually in the Supreme Court, in an important series of actions usually called the Legal Tender Cases. In deciding the questions which these cases raised, the Supreme Court at first denied, but subsequently firmly upheld, the right of Congress to make paper money legal tender for private debts.²

CHAP.
XXVIILegal
tender
cases

This authority is a good illustration of "resulting," as distinguished from implied, powers. The power is not expressly granted to Congress; nor can it be readily implied from any one of the express powers, unless it be the power to borrow money on the credit of the United States. Its existence is rather to be deduced from a combination of several powers expressly granted—indeed, from the general aggregate of powers conferred. It is deducible from the fact that Congress is the legislature of a sovereign nation and that the power to make the notes of the government legal tender in payment of private debts is one of the powers belonging to sovereignty in other civilized nations, and is not expressly withheld by our constitution. It is deducible also from the fact that it is an appropriate means to the execution of the unquestioned powers of Congress to lay and collect taxes, to carry on war, to borrow money, and to regulate the currency. At all events, after the last of the legal tender cases was disposed of, in 1884, all doubt as to the power of Congress to issue paper money and impress upon it the legal tender character vanished.³

Derivation
of the legal
tender
power

Several varieties of paper money, in addition to the green-

¹See p. 512.

²*Hepburn v. Griswold*, 8 Wall, 603 (1870); *Knox v. Lee*, *Parker v. Davis*, 12 Wall, 457 (1871); *Juilliard v. Greenman*, 110 U. S., 421 (1884).

³There is also judicial sanction for deriving the power from the right to coin money. On this point see D. R. Dewey, *Financial History of the United States* (1903), 70. Cf. W. W. Willoughby, *Constitutional Law of the United States*, I, 626-628.

backs, are now in circulation, namely, silver certificates and treasury notes, based upon silver coin and bullion in the treasury; gold certificates, based upon gold coin and bullion in the treasury; federal reserve notes, which are gradually being substituted for the gold certificates; national bank notes; and the federal reserve bank notes. The balance of our national currency consists of gold coin in denominations of from two and one-half dollars (quarter eagles) to twenty dollars (double eagles),¹ silver coin (dollars, half-dollars, quarters, and dimes), and subsidiary coins, *i.e.*, nickels and cents. Paper money is manufactured in the bureau of engraving and printing at Washington; coins are made at four mints, located at Philadelphia, Denver, San Francisco, and New Orleans.²

REFERENCES

- A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), I, 59-63, Appropriations; 115-117, Banks and Banking Act; 181-182, Budgets; 545-551, Public Debt; 690-693, Federal Expenditures; II, 6-10, Financial Policy and Powers of United States; 10-17, Financial Statistics; 322-324, Legal Tender Cases.
- C. C. Plehn, *Introduction to Public Finance* (5th ed., New York, 1926), Pt. III, Chaps., I-II.
- American Year Book* (1925), 304-308; *ibid.* (1926), 306-322.
- E. S. Corwin, "The Spending Power of Congress—Apropos the Maternity Act," *Harvard Law Rev.*, XXXVI, 548-582 (Mar., 1923).
- H. J. Ford, *The Cost of Our National Government* (New York, 1910).
- E. B. Rosa, "Expenditures and Revenues of the Federal Government," *Annals of Amer. Acad. Polit. and Soc. Sci.* XCV, 1-112 (May, 1921).
- F. A. Cleveland, "The Budget and Accounting Law of 1921," *Nat. Mun. Rev.*, XI, 428-437 (Dec., 1922).
- Congressional Digest*, II, 41-49 (Nov., 1922), "The Budget System in Operation."
- W. F. Willoughby, *The National Budget System* (Baltimore, 1927).
- D. H. Smith, *The General Accounting Office* (Baltimore, 1927).
- E. W. Kemmerer, *The A. B. C. of the Federal Reserve System* (6th ed., Princeton, 1926).
- H. P. Willis, *The Federal Reserve System* (New York, 1923).
- , "The Federal Reserve System—A Retrospect of Eight Years," *Polit. Sci. Quar.*, XXXVII, 553-584 (Dec., 1922).
- Annals of Amer. Acad. Polit. and Soc. Sci.*, XCIX, 1-209 (Jan., 1922). Series of articles on the federal reserve system.

¹Gold dollars were coined in 1848-89.

²J. P. Watson, "The Bureau of the Mint," *Service Monographs*, No. 37 (Baltimore, 1926); W. A. DuPuy, "How Our Money is Manufactured," *Curr. Hist.*, XXIV, 236-241 (May, 1926); R. L. Strout, "The Big Job of Making the Small Dollar," *N. Y. Times*, Nov. 20, 1927; *Annual Report of the Secretary of the Treasury* (1927), 84-86, 209-210, 262-263, 369-371, 634, 638.

- W. P. G. Harding, *The Formative Period of the Federal Reserve System* (Boston, 1925).
- A. C. Wiprud, *The Federal Farm Loan System in Operation* (New York, 1921).
- W. S. Holt, *The Federal Farm Loan Bureau* (Baltimore, 1924).
- R. J. Swenson, *The National Government and Business* (New York, 1924), Chaps. VI-VII.
- H. E. Fisk, *Our Public Debt* (New York, 1919).
- A. B. Hepburn, *History of the Currency of the United States* (New York, 1916).
- Annual Reports of the Secretary of the Treasury (Washington).

CHAPTER XXVIII

COMMERCE AND OTHER BUSINESS

Origin
of the
commerce
clause

Lack of power to control the conditions under which trade was carried on with foreign nations and among the several states was a main defect of the Articles of Confederation; and, as we have seen, it was a controversy between states on this subject that led to the Annapolis convention of 1786, and ultimately to the Philadelphia convention which framed the constitution in 1787.¹ The peaceful development of commerce, both domestic and foreign, on equitable and harmonious lines, was recognized as a prime requisite of national stability and growth. Accordingly, the new constitution was so drawn as to give Congress general power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."² Indeed this grant of authority stands second in the list of powers given to Congress, the first being that of raising money by taxes and loans.

Limita-
tions

Only four limitations are imposed: (1) the foreign slave-trade should not be prohibited before 1808; (2) no tax or duty may be laid by Congress on articles exported from any state; (3) no preference may be given by any regulation of commerce or revenue to the ports of one state over those of another; and (4) vessels bound to or from one state may not be obliged to enter, clear, or pay duties in another state. The first of these restrictions was only temporary, and the third and fourth have operated merely to prevent discrimination against the commerce of any state or group of states. Only the second—which was a concession to the southern exporters of agricultural products, designed to shield them from the burden of a tax whose weight was supposed to fall on the exporter himself—has proved a serious limitation upon congressional regulative authority. Export taxes, if allowed, might have been employed at times not only to obtain revenue but to conserve natural resources by checking shipments of lumber, oil, coal, and other products out of the country. There is, however,

¹See pp. 101-102.

²Art. I, § 8, cl. 3.

nothing in the constitution to prevent regulation of the export trade by Congress in any way other than by taxation.

CHAP.
XXVIII

Probably no single clause of the constitution has contributed so much to the expansion of the power of the national government, especially in the past fifty years, as the commerce clause. Apart, furthermore, from the taxing clause, no grant of power has had so much to do with establishing the close relation now existing between government and business—a relation which is likely to grow more, rather than less, intimate as the commercial enterprises of our people increasingly transcend state boundaries.¹ It is one of the marvels of our governmental system that a constitution drawn up to meet the simple needs of the eighteenth century, when pack-horses and sailing vessels were the main agencies of transportation, and when railroads, steamships, telegraphs, and telephone and wireless systems were as yet undreamed of, should have proved adequate to enable Congress to deal with the infinitely more complex commercial activities of the twentieth century without the alteration of a single word or phrase pertaining to trade regulation. The explanation is to be found in the broad interpretation which the Supreme Court from time to time has given to the words “commerce” and “regulate.” Beginning with the famous case of *Gibbons v. Ogden*² in 1824, the court has so expanded the application of these terms in successive decisions (which have almost exactly synchronized with the great advances in the modes of commerce and communication) that the regulative powers of Congress have kept pace fairly well with the nation’s requirements.

Importance
of national
control
over
commerce

Thus it has come about that the term “commerce” now includes not only the exchange of commodities but such varied forms of intercourse as navigation, the maintenance of toll-bridges or ferries for passengers crossing rivers separating two states, the transportation of persons, animals, and goods by land, water, or air;³ and even the transmission of intelligence by means of telegraphic, telephonic, or wireless messages, including radio broadcasting. Over all of these matters the regulating power of Congress extends. Furthermore, Congress not only may regulate all the instrumen-

Meaning
of “com-
merce”

¹ This growing relation, in turn, partly explains why questions which are primarily economic rather than political in the strict sense have come to be the overshadowing issues in national politics since the close of the Reconstruction period. See Chap. XXXII.

² 9 Wheaton, 1; G. C. Lay, “The Commerce Clause of the Constitution: Its History and Development,” *Amer. Law Rev.*, LX, 161-180 (Mar.-Apr., 1926).

³ For the air commerce act of 1926, see *Code of the Laws of the U. S.* (1926), pp. 2119-2123.

talities of commerce, but may itself create corporations to serve as such instrumentalities. In short, as a result of judicial decisions, congressional authority may be said to extend to all forms of traffic and intercourse between the inhabitants of the United States and of foreign countries and between inhabitants of the different states. It is to be noted, however, that transactions are not to be regarded as commercial if the element of transportation is lacking. Agriculture, mining, fishing, and manufacturing are not considered commerce, and hence are not subject to congressional regulation under the commerce clause. On the other hand, there are transactions which seem, to the layman as least, to be quite as closely related to commerce as some of the things which have been held to be included in that term, but which the Supreme Court has thus far regarded only as incidents or aids to commerce and not as themselves commercial acts or instrumentalities. For example, the buying and selling of bills of exchange has been held not to be commerce; likewise the issuing of fire, marine, or life insurance policies, or other contracts.¹

Branches
of the
commerce
power

Along with the power to regulate foreign and interstate commerce, Congress is given authority to regulate commerce with the Indian tribes. This grant was of some importance in our early history, but it may now be passed over with the barest mention. Of far greater significance are those phases of congressional authority which have to do with the regulation of commerce (a) with foreign nations and (b) among the several states, and each of these will be given somewhat detailed treatment in the remainder of this chapter.

Foreign
relations
and the
commerce
power

Although these grants of power are conferred in the same terms, the scope of congressional authority over foreign commerce is in reality the broader of the two. This is explained by the fact that the national government has exclusive, and practically unrestricted, jurisdiction over our relations with foreign nations, and this jurisdiction serves in no small measure to reinforce or supplement the authority granted by the commerce clause.² Thus, for example, the laws controlling the immigration of aliens may be upheld either as regulations of foreign commerce or as expressions of the national government's exclusive control over foreign relations. A similar dual legal foundation underlay the creation, during the recent

¹ W. W. Willoughby, *Constitutional Law of the United States*, II, Chap. XLII. See also J. M. Beck, "The Federal Regulation of Life Insurance," *No. Amer. Rev.*, CLXXXI, 191-201 (Aug., 1905).

² Willoughby, *op. cit.*, II, 769.

war, of the War Trade Board, to which was given jurisdiction over practically all foreign trade and also authority to control exports to foreign countries.¹

CHAP.
XXVIII

Congressional authority to regulate commerce with foreign nations attends and surrounds every voyage or other act of transportation, across the national boundaries, even when commencing or terminating at a remote interior point; and inasmuch as the constitution denies to the states the right to tax imports, congressional authority continues to operate until the importer has either sold the original package or has broken the package for the purpose of selling its contents. Only when the original package or its contents have thus become commingled with the ordinary property of the citizens of the state does the controlling authority of Congress cease and that of the state begin.²

In the exercise of this regulative power Congress has passed many kinds of laws, of which only a few of chief importance can be mentioned here.³

Acts
regulating
foreign
commerce

Under the power to "regulate" foreign commerce, Congress has, on several occasions, gone so far as to attempt temporarily to put an end to such commerce, wholly or partially, by authorizing the establishment of embargoes. This policy has usually been adopted in anticipation of, or in connection with, war with some foreign power.⁴

1. Em-
bargoes

Another species of regulation has taken the form of tonnage duties,⁵ or taxes based upon the cubical capacity of vessels arriv-

2. Tonnage
duties

¹ It should be observed in this connection that there is a possibility of conflict between the treaty-making organs and Congress over the regulation of foreign commerce. Although the matter appears to have been placed exclusively in the hands of Congress, treaties may contain provisions tantamount to regulations of commerce, and even inconsistent with existing tariff laws. Congressional power over foreign commerce is further reënforced by the clause which authorizes Congress to define and punish piracies and felonies on the high seas (Art. I, § 8, cl. 10). See C. F. Burdick, *The Law of the American Constitution*, 71-77.

² *Brown v. Maryland*, 12 Wheaton, 419 (1827). See J. P. Hall, *Constitutional Law*, 274-282.

³ Most of the laws regulating foreign commerce which are now in force may be found in *U. S. Compiled Statutes* (1918), pp. 1217-1352; *ibid.* (1923), pp. 40-41, 512-538; *Code of the Laws of the U. S.* (1926), pp. 351-387.

⁴ Embargoes were laid in 1794, 1807-08, and 1812; also during the recent World War upon commerce destined for neutral countries whose neutrality was suspected.

⁵ The constitution expressly forbids states to levy tonnage duties without the consent of Congress. Such permission was, however, granted in numerous instances in the early history of the country for the purpose of enabling the states to improve their harbors. When the national government assumed the work of harbor improvement, construction of lighthouses, buoys, etc., the main motive for granting such privileges disappeared.

ing in American ports from foreign countries. Fiscal motives have been less conspicuous in such regulations than the desire to aid American shipping, either by imposing heavier duties upon ships built or owned in foreign countries than upon American vessels, or by imposing discriminating duties upon foreign goods imported in any but American vessels. Occasionally, also, such duties have been resorted to by way of retaliation for discriminations against American ships or trade by foreign countries. Where this has been the principal motive, the president has usually been authorized to suspend the duties when discrimination against American ships or goods could be shown to have ceased. An act of 1909 imposed a duty of two cents a ton (not to exceed ten cents in any one year) at each entry of vessels from any foreign port in North and Central America, the British West Indies, or the northern part of South America. A duty of six cents per ton (not to exceed thirty cents in any one year) was imposed on vessels from other foreign ports; and there was also levied an annual tonnage tax upon foreign-built vessels or yachts used for pleasure purposes.¹

Navigation and inspection laws, enacted by the first Congress and on numerous occasions since, form perhaps the largest and most varied single class of strictly commercial regulations.² Chief among the varied purposes of these statutes have been protection of American shipping, stimulation of shipbuilding, safeguarding the health and safety of passengers, and insuring the safety and rights of seamen. All vessels owned by American citizens must be registered in the bureau of navigation in the Department of Commerce, and must have a license; and no American ship may sail for a foreign port without first securing a passport to be deposited with the United States consul upon arrival at its destination. Other laws, designed to protect the health and safety of passengers, fix a minimum number of cubic feet of space to be provided for each person, require the installation of sanitary and safety appliances, and provide for the examination and licensing of pilots, engineers, masters, and mates. Still other enactments, notably the La Follette seamen's act of 1915, define and regulate in great detail the respective rights and duties of officers and seamen.³

¹ *U. S. Compiled Statutes* (1918), pp. 1232-1235; *Code of the Laws of the U. S.* (1926), pp. 1467-1470.

² *U. S. Compiled Statutes* (1918), pp. 1217-1332; *ibid.* (1923), pp. 534-537; *Code of the Laws of the U. S.* (1926), pp. 1470-1536.

³ Most of these regulations also apply to coasting vessels and to shipping on the Great Lakes when engaged in interstate commerce.

As a spur to shipbuilding, the government has sometimes granted subsidies, directly or indirectly, to private companies. The most important step of this kind was taken in 1916 when Congress created the Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and a merchant marine.¹ Under the supervision of this board, acting mainly through a subsidiary organization, the Emergency Fleet Corporation, a merchant marine was built up with such rapidity that by 1920 it was not far below the merchant fleet of Great Britain. In that year, Congress passed a merchant marine act² enlarging the Shipping Board from five to seven members,³ and expanding its powers along lines more directly related to the promotion of peacetime commerce. Besides assisting to build up the coastwise trade and trade between the continental United States and the island dependencies, the Board may establish steamship lines between the United States and foreign countries, prescribe the size, type, and speed of vessels in such service, and regulate the frequency of sailings. And for a period of five years, it was authorized to extend financial aid in the construction of ships in privately owned shipyards.

Shortly after the armistice,⁴ Congress, with a view to promoting the export trade of the country, revived the War Finance Corporation, which it had created for the financial assistance of concerns whose operations were deemed essential to the successful prosecution of the war, and clothed it with entirely new powers.⁵ With a capital stock of five hundred millions, the Finance Corporation is now empowered to make short-term loans aggregating a billion dollars to aid persons, firms, or corporations engaged in the export business.⁶ The affairs of this organization are managed by a board of directors consisting of the secretary of the treasury

CHAP.
XXVIII

4. Laws
developing
a merchant
marine

5. Laws
stimulating
foreign
trade

¹ W. G. McAdoo, "Wanted: American Ships," *Outlook*, CXIII, 326-330 (June 7, 1916); P. H. W. Ross, "The American Merchant Marine," *ibid.*, CXIII, 137-142 (May 17, 1916); *Amer. Year Book* (1918), 52-56; *ibid.* (1919), 598-601.

² *U. S. Compiled Statutes* (1923), pp. 519-534; *Code of the Laws of the U. S.* (1926), pp. 1530-1546; see also *Congressional Directory*, 70th Cong., 1st Sess., 379-383 (Dec., 1927).

³ The members of the Board are appointed by the president and Senate for six-year terms, and receive salaries of \$12,000.

⁴ In March, 1919.

⁵ *U. S. Compiled Statutes* (1918), pp. 460-463; *ibid.* (1923), pp. 177-182; *Code of the Laws of the U. S.* (1926), pp. 381-385.

⁶ In 1921, the Corporation was empowered to make loans for agricultural purposes also. See *Congressional Directory*, 70th Cong., 1st Sess., 385-386 (Dec., 1927).

and four other persons appointed by the president and Senate for four-year terms.¹ For the furtherance of our foreign commerce, and to act, if required, as fiscal agents of the United States, Congress as early as 1913 authorized national banking associations having a capital and surplus amounting to \$1,000,000 to establish branches in foreign countries or in American dependencies. In 1919 it went farther and authorized the organization, under federal charters, of private corporations for the purpose of engaging in international or foreign banking and other financial operations, subject to regulations to be laid down by the Federal Reserve Board. With the approval of that board, such corporations may also purchase and hold under certain limitations the capital stock of non-competing domestic or foreign trading corporations.²

6. Protec-
tive tariffs

Tariff laws are the regulations of foreign commerce with which the ordinary citizen is probably most familiar. When the main object of such laws has been the protection and stimulation of home industries, rather than the production of revenue, their legal justification is to be found quite as much in the power to regulate foreign commerce as in the taxing power of Congress.³

7. Immi-
gration
laws

Laws which restrict or otherwise regulate foreign immigration into this country have, similarly, a two-fold legal basis. Over all matters relating to immigration the national government has exclusive jurisdiction,⁴ both by reason of the power granted in the commerce clause and also by virtue of the fact that such jurisdiction is an incident of the power of a sovereign government to control its own foreign relations.⁵ Not until 1882, however, did Congress definitely embark upon a policy of restricting the admission of aliens into the country, and of even excluding certain ones altogether. Legislation aimed at exclusion has since that date been based upon the principle of denying admission to aliens who are physically, morally, and economically below certain standards. The first law (1882) excluded only idiots, escaped convicts, and persons likely to become public charges. As successive measures were passed, the debarred classes were steadily enlarged until, under the law of 1917, no fewer than thirty grounds of exclusion were enumerated. Chief among the classes debarred are criminals,

¹ Salaries are fixed at \$12,000.

² *U. S. Compiled Statutes* (1923), pp. 633-637; *Code of the Laws of the U. S.* (1926), pp. 292-296.

³ Tariff legislation has been considered elsewhere. See pp. 489-494.

⁴ *Passenger Cases*, 7 Howard, 283 (1848).

⁵ *Chinese Exclusion Cases*, 130 U. S., 581 (1889); 149 U. S., 698 (1893); also W. W. Willoughby, *Constitutional Law of the United States*, II, 1286-1293.

paupers and persons likely to become public charges, persons afflicted with contagious or infectious diseases, persons of unsound mind, anarchists, Chinese coolies, and contract laborers. The last have been excluded since 1885 at the behest of organized labor.¹ Altogether, these restrictions have operated to keep out of the country from two to eight per cent annually of the aliens applying for admission. A long agitation for a literacy test finally led Congress to enact in 1917, over the veto of President Wilson, a law adding to the foregoing classes persons who cannot read the English language or some other language or dialect.²

CHAP.
XXVIII

In 1921 further legislation resulted from the apprehension that, owing to post-war conditions in Europe, the stream of immigration, which had almost ceased to flow during the war, would soon swell to dangerous proportions. In fact, before Congress was able to act, the number of immigrants rose to 430,000 in 1920 and to 805,000 the next year. In the legislation of 1921 Congress adopted a new basis of restriction, known as the quota standard. The number of annual admissions from any country was not to exceed three per cent of the number of foreign-born persons of that nationality who were in the country when the census of 1910 was taken.³ This law was admittedly a makeshift, designed to meet an emergency and to serve until a permanent policy could be agreed upon. Consequently, its operation was limited to about a year. Its immediate and intended effect was to cut down the number of immigrants from eastern and southeastern Europe—generally regarded as among the least desirable—and to encourage immigration from northern and western Europe.

Law of
1921

No agreement having been reached by the date set for the expiration of this law, Congress renewed it for two years, *i.e.*, until June 30, 1924. In that year an act was passed which embodied two distinct methods of immigration control, one being limited to a three-year period (1924-27) and the other being designed to be permanent.⁴ The yearly quota, although retained temporarily, was reduced to two per cent and based upon the census of 1890 instead of 1910, the effect of this change being to cut down the number of admissible aliens from nearly 358,000, allowed under the law of

Law of
1924

¹ *Code of the Laws of the U. S.* (1926), pp. 131-132, 150-157.

² *U. S. Compiled Statutes* (1918), pp. 632-652; *Code of the Laws of the U. S.* (1926), p. 132.

³ *U. S. Compiled Statutes* (1923), pp. 230-232. For a criticism of this law, see F. A. Kellor, "Humanizing the Immigration Law," *No. Amer. Rev.*, CCXVII, 769-784 (June, 1923).

⁴ *Code of the Laws of the U. S.* (1926), pp. 143-150.

1921, to about 164,000.¹ The permanent policy was to have come into operation on July 1, 1927, when this quota plan was to be discarded and, in its place, the "national origins" of the white inhabitants of the country according to the census of 1920 was to be made the basis of admissions. A total of only 150,000 persons were to be admitted annually, and the number admitted each year was to be distributed proportionally among the different nationalities that have contributed to our national stock, except that no limits were to be imposed upon the number entering from North, Central, and South American countries; and a minimum allowance of one hundred was to be granted to other countries. On the other hand, no quotas were given to those countries whose nationals are ineligible to American citizenship. Under this principle, the quota from Great Britain and Ireland would be three-fifths of 150,000, or about 90,000, inasmuch as three-fifths of the white population in 1920 originated in those countries.

The following table shows, comparatively, the effects of the legislation of 1921 and 1924 upon immigration from different parts of Europe, as forecast by Congress in 1924.

<i>Origin</i>	<i>Quota, 1924</i> (3%-1910)	<i>Quota 1924-27</i> (2%-1890)	<i>Quota after July, 1927</i> (1920 census)
Italy	42,057	3,845	5,877
Czechoslovakia	14,357	3,073	1,319
Russia	24,405	2,248	4,002
Poland	30,977	5,982	4,509
Germany	67,607	51,227	22,017
Great Britain and Ireland	77,342	62,574	91,110 ²

The law of 1924 required the secretary of state, the secretary of commerce, and the secretary of labor to work out the exact quotas to be admitted under this national-origins plan. Their report was submitted to Congress in January, 1927, but it was

¹ *Report of the Commissioner-General of Immigration* (1924), 24-30.

² Only the British-Irish and German quotas exceed 6,000 under the national origins formula; together they form about three-fourths of the total admissions, whereas under the law of 1921 they composed barely two-fifths. R. DeC. Ward, "Our New Immigration Policy," *Foreign Affairs*, III, 99-111 (Sept., 1924); G. W. Hinman, Jr., "National Origins: Our New Immigration Formula," *Rev. of Revs.*, LXX, 304-309 (Sept., 1924); H. P. Fairchild, "The Immigration Law of 1924," *Quar. Jour. Econ.*, XXXVIII, 653-665 (Aug., 1924); R. L. Buell, "The Development of Anti-Japanese Agitation in the United States," *Polit. Sci. Quar.*, XXXVII, 605-638 (Dec., 1922); R. McElroy, "New Immigration Law Over Japan's Protest," *Curr. Hist.*, XX, 648-652 (July, 1924); W. W. Husband, "How Restricted Immigration Works Out," *ibid.*, XV, 604-609 (Jan., 1922); *Congressional Digest*, II, 291-320 (July-Aug., 1923); A. W. Stockwell, "How the Immigration Law is Succeeding," *Curr. Hist.*, XXV, 517-522 (Jan., 1927).

accompanied by a statement that "in our opinion the statistical and historical information available raises grave doubts as to the whole value of this computation as a basis for the purposes intended. We cannot, therefore, assume responsibility for such conclusions under the circumstances."¹ With the validity of the report thus impeached by its official authors, politicians and organizations representing constituencies made up largely of Irish, German, and Scandinavian voters were emboldened to resort to obstructive tactics in Congress, since the report called for sharp reductions in the number of admissible immigrants from the Irish Free State, Germany, and Scandinavia, although allowing slight increases in the numbers coming from England, Northern Ireland, and Italy. The result was that Congress, in March, 1927, and again in March, 1928, adopted a joint resolution postponing for a year the execution of the national-origins provisions of the act of 1924 and continuing in the meantime the quotas in force in 1924-1928.²

The administration of the immigration laws was originally left mainly to state officials. Since 1891, however, the work has been assigned to federal immigration inspectors stationed at all ports of entry and working under the supervision of a commissioner-general of immigration, who is at the head of the bureau of immigration in the Department of Labor. Immigrants who consider that they have been unjustly denied admission to the country may appeal ultimately to the secretary of labor, whose decision, in most cases, is final.³ The authority of the commissioner-general was greatly enlarged in 1918 by an amendment to the immigration law authorizing him to expel from the country alien revolutionists, anarchists, advocates of sabotage, violence, or assassination, and other aliens who aid and abet them. Under this grant of authority was carried out the sensational deportation to Russia of the so-called "Reds" in 1919. Persons debarred for any reason under the laws are transported back to the country from which they came at the expense of the steamship company which brought them over.⁴ Under the law of 1924, the bureau of immigration has

Immigra-
tion
officials

¹ Revised quotas under the national-origins rule were submitted to Congress early in 1928. See *U. S. Daily*, Feb. 28, 1928, p. 3645.

² See *U. S. Daily*, Mar. 5, 1927, p. 14, and Mar. 31, 1928, p. 257.

³ See L. F. Post, "Administrative Decisions in Connection with Immigration," *Amer. Polit. Sci. Rev.*, X, 251-261 (May, 1916).

⁴ See E. Freund, "Deportation Legislation in the 69th Congress," *Social Service Rev.*, I, 46-57 (Mar., 1927). For other recommended changes in the immigration law, see J. J. Davis, "The Immigration Law to be Strengthened," *N. Y. Times*, Nov. 27, 1927; *Report of the Commissioner-General of Immigration* (1927), 22-25.

organized a "foreign service" to assist in preventing undesirable or ineligible aliens from embarking for this country. Experienced immigration officers are now assigned to American consulates abroad in the capacity of technical advisers on immigration matters.¹ Not only is this an important and long-needed step toward the selection of immigrants at the source, but it has also resulted in a marked decline in the number of rejections at the ports of arrival in this country. An immigration border patrol has also been organized, with more than seven hundred border patrol inspectors, mounted and otherwise. They are charged with the duty of preventing the smuggling of aliens into the country from Canada, Mexico, and near-by islands.²

From what has been said one may obtain some idea of the importance and ramifications of the power granted to Congress to regulate foreign commerce. But of even greater consequence, especially in the development of the powers of the national government, has been the coördinate grant of power to regulate commerce "among the several states," usually called interstate commerce. To this we now turn.

The regulation of commercial transactions which are begun, wholly carried on, and completed within a single state falls exclusively to the authorities of that state. But the moment such a transaction crosses a state boundary it ceases to be intrastate, and becomes interstate, commerce. Even a shipment of goods or a railroad journey beginning and ending in the same state becomes an interstate transaction, subject to congressional regulation, if at any point in the journey a state boundary line is crossed. Not only does the interstate character attach to such a shipment of goods the moment it is delivered by the shipper at the freight-office, warehouse, or depot of a common carrier, *i.e.*, a railroad, steamship, or express company, but it continues to adhere to the transaction throughout the entire journey and until the goods have been delivered to the consignee. Only then do the authorities of that state have the right to tax them or otherwise to regulate their sale or use.³ It is substantially correct to say that Congress enjoys *exclusive* authority to regulate interstate commerce, and that this

¹ In 1927 such advisers were to be found in twenty-five European cities.

² See *Report of the Commissioner-General of Immigration* for 1925, 1926, and 1927; J. J. Davis, "Bootleg Immigrants," *Rev. of Revs.*, LXVII, 615-617 (June, 1923).

³ W. W. Willoughby, *Constitutional Law of the United States*, II, 643-665; J. P. Hall, *Constitutional Law*, 283-300.

authority reaches to water-borne commerce as well as to commerce carried on by land, or partly by land and partly by water; indeed, wherever navigable waters form, either in their natural condition or by artificial union with other waters, a continuous highway over which commerce is carried on between two or more states, or with a foreign country, they become "navigable waters of the United States," whose use Congress may control as an incident to the power to regulate foreign and interstate commerce.¹ But congressional power over interstate commerce does not stop here. It extends also to persons who, or corporations which, make a business of transporting articles or persons from state to state, and likewise to their relations with their employees engaged in interstate transportation;² and this explains why Congress may legally require railway companies to equip their trains with safety appliances, to limit the number of hours of labor per day of their employees, and to grant them compensation when injured in the course of their employment.

CHAP.
XXVIIIScope of
national
control

Although the bulk of interstate commerce is carried on by private persons, firms, and corporations, the national government has the undoubted right to engage in such commerce itself, and, therefore, to create and control companies for the construction and operation of highways, bridges, canals, railroads, and other instrumentalities of commerce.³ Under this authority, and backed by the financial resources of the national government, the construction of the first transcontinental railroad was begun during the Civil War. While the national government may thus create corporations whose primary purpose is to engage in interstate commerce, it may not charter those whose main business is manufacturing, nor regulate conditions under which manufacturing is carried on.⁴ It does have authority, however, through Congress, to require manufacturing corporations chartered under state laws to take out a federal license before engaging in interstate commerce, and it may lay down conditions which must be fulfilled as a prerequisite to the granting of such licenses. Some fifteen years ago, this idea

Corpora-
tions
created by
the gov-
ernment

¹ Willoughby, *op. cit.*, II, 768; M. Starr, "Navigable Waters of the United States—State and National Control," *Harvard Law Rev.*, XXXV, 154-181 (Dec., 1921).

² See Railway Labor Act, *Code of the Laws of the U. S.* (1926), pp. 2105-2110.

³ W. W. Willoughby, *Constitutional Law of the United States*, II, 763.

⁴ H. Hull and T. I. Parkinson, "The Federal Child Labor Law: the Question of Its Constitutionality," *Polit. Sci. Quar.*, XXXI, 519-540 (Dec., 1916); T. R. Powell, "The Child Labor Law, the Tenth Amendment, and the Commerce Clause," *Southern Law Rev.*, III, 175-202 (Aug., 1918).

of a federal license for state corporations was widely advocated as an effective means of preventing monopolies and unfair practices between competitors engaged in interstate commerce; but no national legislation establishing such a system has yet been enacted.¹ Upon other phases of interstate commerce, however, Congress has enacted a large amount of legislation, although this has never taken the form of an elaborate and systematic commercial code.²

Early laws
affecting
interstate
commerce

During practically the first hundred years under the constitution no laws were passed which could be regarded, speaking strictly, as *regulations* of interstate commerce. To be sure, appropriations and land grants were made from time to time for internal improvements, as they were then called, including the establishment and maintenance of lighthouses and buoys, the dredging of rivers and harbors, the construction and up-keep of highways, turnpikes, and bridges, and the building of canals and, eventually, railroads. But regulatory provisions were almost entirely absent, and the constitutionality of such appropriations, except those for river and harbor improvements, was quite as often upheld under the postal and war powers of the government as under the commerce clause.³

River and
harbor
legislation

Of these objects of national expenditure, only river and harbor improvement calls for more than passing notice here. Along with the sums appropriated from time to time for perfectly worthy undertakings involving the improvement of harbors on the coast and of the larger rivers of the interior, millions of dollars have been wasted, as a result of log-rolling, upon utterly worthless enterprises. Most members of Congress have been eager to obtain expenditures of national funds within their respective states and districts, in the hope of enhancing their popularity with constituents and thereby ensuring their reelection. Accordingly, the river and harbor appropriation bill, which appears in Congress annually, has come to be regarded as one of the most flagrant instances of pork-barrel legislation, a reputation which places it in the company of appropriation bills for public buildings and private pensions. Prior to the Civil War, appropriations for this purpose were kept

¹S. D. Hudson, "Federal Incorporation," *Polit. Sci. Quar.*, XXVI, 63-97 (Mar., 1911).

²*U. S. Compiled Statutes* (1918), pp. 1352-1458; *ibid.* (1923), pp. 548-595, 674-686. *Code of the Laws of the U. S.* (1926), pp. 1549-1555, 1649-1688.

³A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, II, 202.

down to a comparatively low figure, the total for that long period amounting to less than fifteen million dollars. Since then, however, single river and harbor bills have carried items aggregating between thirty and fifty millions.¹ Before the adoption of the budget system in 1921, the preparation of such bills was in the hands of the committee on rivers and harbors; but with the changes introduced that year, the task fell to the reorganized appropriations committee. At the time it was anticipated that the new method would lead to the elimination of log-rolling and to large savings at this point to the national treasury. That such a result is by no means assured, however, appears from the fact that in 1923 the House, in opposition to the recommendations of both the budget bureau and its own appropriations committee, added to the army appropriations bill twenty-nine million dollars to be used for river and harbor work; and the Senate did not interpose objection.² Nevertheless the "pork-barrel" aspects of river and harbor acts have largely disappeared in the past few years owing to a change in the method of making appropriations. Although Congress continues to *authorize* each separate improvement project, the appropriations to carry out these improvements are, in most instances, no longer voted for specific projects by name but in the form of a lump sum to be expended largely at the discretion of the secretary of war and the board of engineers for rivers and harbors. If a project has been authorized of which these officials disapprove, the funds necessary to carry out the improvement may be withheld.³

Aside from river and harbor bills, little national legislation affecting interstate commerce was enacted until about forty years ago. Railroads naturally took on an interstate character at an early stage of their development; but regulation of their operations was long left entirely to the states. Only after the Civil War, when railway building set in on a greatly enlarged scale and the inadequacy of state regulation became increasingly manifest, was a movement started for national control. One plan looked to detailed regulation of rates and services directly by Congress; and for ten years after 1878, a bill of this general purport appeared in the House of Representatives at practically every session. A less radical proposal was to create a commission, on the analogy of

CHAP.
XXVIII

The
Interstate
Commerce
Act (1887)

¹H. B. Fuller, "American Waterways and the Pork Barrel," *Century Mag.*, LXXXV, 386-396 (Jan., 1913).

²See p. 507.

³*Code of the Laws of the U. S.* (1926), pp. 1078-1090. See 44 *U. S. Statutes at Large*, Part 2, pp. 1010 ff., for the river and harbor act of 1927.

various state commissions,¹ with power to gather information, hear complaints, and make detailed application of such general rules as Congress should lay down. And after long wavering between the two policies, Congress adopted the latter, in 1887, being impelled to that action by a startling decision of the Supreme Court in the *Wabash* case in the preceding year, to the effect that no state had a right to adopt regulations affecting the movement of commerce among the several states.² The resulting measure, known as the "Act to Regulate Commerce," became the first of a long series of national statutes regulating railways and other public service corporations, with a view to preventing excessive charges, discriminations, and other unfair practices; and it both laid down principles and rules which these corporations must observe, and created a commission to administer the restrictions and enforce obedience.

Scope of
regulation

With numerous amendments which have greatly enlarged its original scope, the act of 1887 now applies to all interstate commerce carried on by railroads, by steamboat lines which form part of a system of railway transportation, by express companies, by sleeping-car and other private-car lines, and by pipe lines, except those for the transportation of gas and water. It applies, likewise, to bridges, ferries, car-floats, and lighters, to all terminal and transportation facilities used in the interstate transportation of persons and freight, and to all instrumentalities and facilities used for the transmission of intelligence by means of electricity, such as telegraph, telephone, cable, and wireless companies. Upon all corporations operating any of these instrumentalities of public service, and especially upon carriers, numerous restrictions are imposed, each of which reflects some earlier abuse.³ Thus, (1) rates for the transportation of persons and freight and for the transmission of messages must be just and reasonable; (2) rebating, directly or indirectly, and undue discrimination or preferences between persons or localities are prohibited under severe penalties; (3) charging a higher rate for a short haul than for a long one over the same line in the same direction is prohibited, except in certain special instances, when authorized by the Interstate Commerce Commission; (4) free transportation may be granted by carriers only to narrowly restricted classes of persons;

Restric-
tions
imposed on
carriers

¹ The first such body was the Massachusetts Railroad Commission, created in 1869. By 1885 there were similar agencies in thirteen states.

² *Wabash, etc., Railway Co., v. Illinois*, 118 U. S., 557 (1886).

³ *U. S. Compiled Statutes* (1918), pp. 1352-1389; *Code of the Laws of the U. S.* (1926), pp. 1649-1684.

(5) railroad companies may not transport commodities, except timber and its products, in the production or manufacture of which they have a direct property interest; (6) pooling of freights by competing railways was prohibited until 1920, when the law was amended so as to empower the Interstate Commerce Commission to authorize pooling arrangements under certain conditions; (7) common carriers are prohibited, except in a few special cases, from operating, owning, or controlling, or having any interest in, any competing carrier by water; (8) carriers are prohibited from issuing stocks, bonds, or other securities without the previous consent of the Interstate Commerce Commission.¹

CHAP.
XXVIII

In addition to these restraints, numerous positive duties also have been imposed. For example, (1) printed schedules of rates must be kept open for public inspection, and changes therein may be made only after permission has been granted by the Interstate Commerce Commission; (2) to this Commission full and complete annual reports must be made, covering such matters, and arranged in such form, as the Commission prescribes; (3) all accounts must be kept according to a uniform system, authorized by the Commission; (4) in case of injury to any of its employees, a carrier must grant pecuniary compensation, unless the accident was caused by the willful act or negligence of the injured party; (5) carriers are prohibited from employing, in interstate commerce, despatchers and trainmen longer than nine and sixteen hours, respectively, within any period of twenty-four hours; (6) eight hours has been fixed as a standard or basic work-day for railway employees engaged in the operation of trains, and carriers are obliged to conform their wage schedules to this standard, and to grant overtime pay for work done in excess of eight hours;² (7) railroad companies are required to equip all trains engaged in interstate commerce with automatic safety appliances.

Duties
imposed

The frequent mention of the Interstate Commerce Commission—which is the administrative board charged with the enforcement of all the regulations just indicated, and of innumerable minor ones as well³—suggests that the effectiveness of the regulations depends

Interstate
Commerce
Commis-
sion and
its juris-
diction

¹ One of the important provisions of the Interstate Commerce Act is that which authorizes the Commission "to inquire into the management of the business of all common carriers" subject to the act, and directs it to "keep itself informed as to the manner and method in which the same is conducted."

² T. R. Powell, "The Supreme Court and the Adamson Law," *Univ. of Penn. Law Rev.*, LXV, 1-27 (May, 1917).

³ For a more extended summary of the duties of the Commission, see *Congressional Directory*, 70th Cong., 1st Sess., 366-373 (Dec., 1927).

in a large degree upon the integrity, independence, and individual efficiency of members of the Commission, upon their knowledge of the facts involved in the highly intricate and technical problems coming before them, and especially upon the wisdom with which they use their discretionary authority in applying the laws so as to benefit the general public and at the same time to work no real injustice to the carriers and other corporations concerned. The Commission, as we have seen, was established by the original regulating act of 1887. For a long time its jurisdiction was practically limited to interstate railroads. But in 1906 express and sleeping-car companies and the owners of pipe lines, except those for the transmission of gas and water, were brought under its control.¹ In 1910 its jurisdiction was extended to embrace corporations operating cable, telegraph, telephone, and wireless systems.² In 1913 it was instructed to institute and supervise the huge task of making an inventory, or "physical valuation," of all property in the country belonging to interstate carriers. And still more recent legislation has authorized it to prepare and adopt, as soon as practicable, a plan for the consolidation of railway properties into a limited number of systems—a project which is admittedly a step in the direction of a possible future creation of consolidated regional transportation systems, with partial decentralization in their supervision and control.³ Still other statutes, notably the Clayton Anti-Trust Act of 1914 and the Transportation Act of

¹ F. H. Dixon, "The Interstate Commerce Act as Amended," *Quar. Jour. Econ.*, XXI, 22-56 (Nov., 1906).

² Foreign and interstate air commerce is regulated by the secretary of commerce under the Air Commerce Act passed in 1926. See *Code of the Laws of the U. S.* (1926), pp. 2119-2123; F. P. Lee, "The Air Commerce Act of 1926," *Amer. Bar Assoc. Jour.*, XII, 371-376 (June, 1926). The regulation of radio broadcasting was brought under federal authority by the Radio Control Act passed in February, 1927. Until March 16, 1929, this law is to be administered by a radio commission of five persons, appointed by the president and Senate for six-year terms, with the secretary of commerce acting as the executive officer of the commission. The subsequent administration of the act will fall almost wholly to the secretary of commerce, with the commission serving in an advisory or quasi-judicial capacity. See *N. Y. Times*, February 20, 1927; *U. S. Daily*, Feb. 25, 1927, p. 4376; W. J. Davis, "The Radio Act of 1927," *Virginia Law Rev.*, XIII, 611-618 (June, 1927); 44 *U. S. Statutes at Large*, Pt. 2, pp. 1162-1174.

³ A "Tentative Plan of the Commission," published August 3, 1921, calls for nineteen great regional systems. For this plan and the report of Professor Ripley upon which it is based, see 63 *Interstate Commerce Commission*, 455 ff. (1921). See also, *Amer. Econ. Rev.*, Suppl., XIV, 42-108 (Mar., 1924), series of articles on railway consolidation; W. Z. Ripley, "On with Railway Consolidation," *World's Work*, LII, 41-48 (May, 1926); *Congressional Digest*, VI, 75-96 (Mar., 1927), "The Problem of Railroad Consolidation," F. Sargent and H. Hoch, "The Railroad Merger Issue is Defined Anew," *N. Y. Times*, Nov. 27, 1927.

1920, have materially added to the Commission's duties and responsibilities. As a result of this steady augmentation of activities the Commission has been increased from five to seven, nine, and finally eleven, members,¹ and a staff of nearly nineteen hundred persons—clerks, attorneys, examiners, statisticians, investigators, and technical experts—has been built up. The staff is organized in fourteen major bureaus,² each under a director or chief who reports directly to a commissioner or to the full Commission. The Commission itself is also divided into six divisions, the assignment of members of the different divisions being changed at comparatively brief intervals. The commissioners work mainly in Washington; yet they often go out, singly or in groups, to gather information and hold hearings in distant parts of the country.

Under the original law, the Commission did not claim power to make rates on its own initiative. Being called upon frequently, however, to decide whether rates charged by carriers were reasonable or unreasonable, it fell into the practice of prescribing, in given cases, what the rate should be; that is, it modified rates on complaint. Not unnaturally, this construction of its power was challenged by the interests adversely affected, and presently cases involving the question got into the courts. Two great decisions resulted. In the *Maximum Freight Rate* case of 1896, the Supreme Court held that the power to fix tariffs of rates for common carriers is legislative in character and cannot properly be exercised by an administrative commission unless expressly conferred upon it;³ and in the *Alabama Midland* case of 1897, the Court nullified the "long and short haul" clause of the act of 1887 by denying the power of the Commission to establish the reasonableness of rates relatively as between competing places.⁴ These rulings stripped the law of all its vigor, and, further baffled by the dilatory and obstructive practices of the attorneys for the carriers, the Commission became almost powerless.⁵ For upwards of a decade, the future of the entire scheme of national regulation by commission

Power
over rates

¹ Appointed by the president and Senate for four-year terms, with salaries of \$12,000.

² These bureaus are as follows: accounts, administration, finance, formal cases, informal cases, inquiry, law, locomotive inspection, safety, service, signal and train control, statistics, traffic, and valuation.

³ *Interstate Commerce Commission v. Cincinnati, N. O., and T. P. Ry. Co., et al.*, 167 U. S. 479.

⁴ *Alabama Midland Ry. Co. v. Interstate Commerce Commission*, 168 U. S., 144.

⁵ E. P. Bacon, "The Inadequate Powers of the Interstate Commerce Commission," *No. Amer. Rev.*, CLXXIV, 46-58 (Jan., 1902).

hung in the balance. Ultimately, however—although only after a vigorous campaign of popular education, and in the face of persistent opposition from the carriers—the necessity of conferring upon the Commission extensive rate-making power was brought home to the national mind; and in the same act of 1906 which extended the Commission's jurisdiction to new forms of interstate commerce, the body was empowered, on complaint and after a hearing, to fix "just and reasonable" maximum rates, regulations, and practices. Some people wanted to endow the Commission with the same power to prescribe exact (rather than merely maximum) rates which certain state railroad commissions enjoyed. The railroads successfully opposed this plan, and until 1920 the Commission fixed only the maximum rates to be charged in a given case. This, however, was a very great power, and chiefly through exercise of it the Commission became the "economic supreme court of the American transportation world." Finally, in 1920, the Commission's authority was enlarged to include not only the prescribing of just and reasonable charges, but also the fixing of definite maximum *or* minimum, or maximum *and* minimum, charges.¹

Procedure

Not only does the Commission enjoy quasi-judicial power in the determination of rates; it has extensive inquisitorial powers as well. It may investigate the manner in which the carriers and other corporations under its jurisdiction comply with the requirements of law; it may compel the attendance of witnesses and the production of evidence; and, through the Department of Justice, it may institute prosecutions for any violation of the law or failure to comply with the Commission's orders in enforcing the law. Rate-making and other proceedings before the Commission assume substantially the character of proceedings in a court of justice; the various parties are represented by their attorneys, witnesses are examined, and documentary or other evidence is submitted. The decisions are embodied in rulings or orders, which are enforceable in the federal courts in proper proceedings; and to these courts appeals may be taken by parties adversely affected.²

Value of
the Com-
mission

In spite of many obstacles interposed at different times by carriers and other corporations and by court decisions, the Commission has achieved valuable results, especially in the field of railroad regulation. Not the least of these has been the dissemi-

¹ *U. S. Compiled Statutes* (1923), pp. 560-561; *Code of the Laws of the U. S.* (1926), pp. 1660-1661.

² J. Bernhardt, "The Interstate Commerce Commission," *Service Monographs*, No. 18 (Baltimore, 1923).

nation of knowledge of, and the stimulation of thought and discussion upon, railway affairs. "It has furthermore served as a stimulus to railway managements, and, at the same time, as a restraint upon them; has aided in raising the morale of the railway service; and, above all, has kept awake in the minds of railway men a sense of their obligation to the public."¹

Statutes regulating carriers and means of communication constitute by far the larger of the two main classes of interstate commerce regulations. But hardly second in importance are the acts of Congress—even though not very numerous—intended to prevent the growth of capitalistic combinations commonly known as trusts.² For more than a hundred years the regulation of combinations which restrained trade was left entirely to the states; and whatever state action was taken rested either upon the old common-law principle that all combinations which restrain trade *unreasonably* are illegal or upon some specific statute modifying or defining the application of the common-law rule. The prevention or regulation of such combinations did not begin to be a serious problem, demanding something more than sharply conflicting decisions of state courts and widely varying state laws, until shortly before 1890. In that year Congress intervened for the first time, and, making use of its power over interstate commerce, passed the Sherman Anti-Trust Act, whose purpose was "to protect trade and commerce against unlawful restraints and monopolies," by declaring, in sweeping general terms, every contract, combination, or conspiracy in restraint of trade or commerce among the several states and with foreign nations to be illegal, and providing heavy penalties.³

No special agency, however, was created to administer this anti-trust act, and its enforcement naturally fell to the Department of Justice, along with the execution of a multitude of other statutes. The result was that the law remained almost a dead letter until the government successfully prosecuted the Northern Securities case in 1905. This case involved the legality of a holding

CHAP.
XXVIII

Anti-trust
laws

The
Sherman
Act (1890)

Enforce-
ment

¹ A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, II, 223. See also S. O. Dunn, "What is the Matter with Railway Regulation?" *No. Amer. Rev.*, CCII, 736-745 (Nov., 1915), and "Ten Years of Railroad Regulation," *Scribner's Mag.*, LX, 412-419 (Oct., 1916).

² *U. S. Compiled Statutes* (1918), pp. 1423-1435; *Code of the Laws of the U. S.* (1926), pp. 351-361.

³ G. F. Edmunds, "The Interstate Trust and Commerce Act of 1890," *No. Amer. Rev.*, CXIV, 801-817 (Dec., 1917); F. E. Leupp, "The Father of the Anti-Trust-Law," *Outlook*, XCIX, 271-276 (Sept. 30, 1911).

corporation, created for the sole purpose of holding and voting the stock of two formerly competing railway systems. By this device it was hoped that, without violating the letter of the law, the former competitors would be enabled to operate substantially as a unit. The Supreme Court, however, held that, although the form of the combination did not, in this instance, necessarily eliminate competition, this result was, nevertheless, the evident purpose back of the corporation and would be its ultimate effect; and therefore the Court ordered that the corporation be dissolved.¹

Bureau of
corpora-
tions

During the next ten years the anti-trust law was enforced with far more energy than before.² Success in the Northern Securities case lent fresh zest. Besides, there was the impetus which came from a new investigative agency, the bureau of corporations, created in the Department of Commerce and Labor in 1903. For eleven years this bureau was actively engaged in investigating the interstate activities of large corporations which were outside the jurisdiction of the Interstate Commerce Commission. By giving ample publicity to the organization, resources, and peculiar business methods of these establishments, it was hoped that an effective check might be imposed upon the growth of monopolies and trusts. The evidence which the bureau obtained as the result of its inquisitorial labors was made the basis of a number of important and successful prosecutions by the Department of Justice before the bureau went out of existence in 1914.³ In deciding some of these cases the Supreme Court found it necessary, notwithstanding the unqualified language of the anti-trust law, to distinguish between combinations which, in the Court's opinion, effected only a "reasonable," and those which amounted to an "unreasonable," restraint of interstate or foreign trade. In the cases against the American Tobacco Company and the Standard Oil Company, in 1911, for example, the Court applied this "rule of reason" and

The "rule
of reason"

¹J. W. Garner, "The Northern Securities Case," *Annals Amer. Acad. Polit. and Soc. Sci.*, XXIV, 123-147 (July, 1904). Before this, the Supreme Court had held that the anti-trust law did not prohibit combinations of manufacturers, in *United States v. E. C. Knight Co.*, 156 U. S., 1 (1894); but that railway combinations were prohibited by it, in *United States v. Trans-Missouri Freight Association*, 166 U. S., 290 (1897), and *United States v. Joint Traffic Association*, 171 U. S., 505 (1898). See, however, *Addyston Pipe and Steel Co. v. United States*, 175 U. S., 211 (1899).

²G. W. Wickersham, "The Enforcement of the Anti-trust Law," *Century Mag.*, LXXXIII, 616-622 (Feb., 1912).

³A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, I, 474.

in effect read into the law declaring illegal "every" combination, etc., in restraint of trade, the word "unreasonable," after the word "every." The effect was practically to reverse or overrule earlier decisions in which the Court had held that *all* such combinations in restraint of trade came within the inhibition of the statute.¹

CHAP.
XXVIII

The decisions in the two cases just mentioned brought clearly before the public the fact that if the anti-trust law applied only to "unreasonable" combinations and contracts, some means ought to be provided whereby well-intentioned combinations might know definitely whether they would be regarded by the government as "reasonable," and therefore lawful, without first being subjected to a criminal prosecution to determine their legal status. For the satisfactory and expeditious decision of such questions, the ordinary courts of justice are obviously ill-fitted; the large amount of investigative work involved could better be carried on, it was argued, by an administrative commission, similar to the Interstate Commerce Commission. At the same time, an insistent demand sprang up for such clarification of the anti-trust law as would indicate specifically the kinds of contracts which the government would regard as unreasonable restraints upon trade. Furthermore, since the dissolution of the tobacco and oil trusts had been based largely upon their unfair competitive methods, a simultaneous demand arose for incorporating in the anti-trust law an enumeration of all competitive practices which the government deemed unreasonable or unfair, and therefore illegal, rendering the party employing them liable to prosecution.² As an alternative, it was proposed to leave the determination of what constituted fair and unfair practices in specific cases, as well as what constituted reasonable and unreasonable restraints upon trade, to an administrative commission clothed with quasi-judicial powers and working along lines similar to those followed by the Interstate Commerce Commission in determining the justness and reasonableness of railway rates. The result was the enactment, in 1914, of the Clayton Anti-Trust Law and the law creating the Federal Trade Commission and transferring to it the personnel, powers, and authority

Need for
further
legislation

¹ H. R. Seager, "The Recent Trust Decisions," *Polit. Sci. Quar.*, XXVI, 581-614 (Dec., 1911).

² W. S. Stevens, "Unfair Competition: a Study of Certain Practices and their Relations to the Trust Problem in the United States," *ibid.*, XXIX, 282-306 (June, 1914).

CHAP.
XXVIIIFederal
Trade
Commis-
sionWork
of the
Federal
Trade
Commis-
sion

of the bureau of corporations, which thereupon ceased to exist.¹ The anti-trust law was not repealed or weakened in any essential point; its enforcement was not to be abated in the least where combinations were found to exist which, in the judgment of the Commission, were unreasonable or which were based upon "unfair competitive methods."² All cases of this sort were to be reported to the Department of Justice for prosecution as formerly.

Upon the Federal Trade Commission is imposed the very important duty of (1) preventing persons and corporations (except banks and common carriers) from using unfair methods of competition in commerce; (2) conducting investigations of, and requiring reports from, corporations engaged in interstate commerce (except banks and common carriers); (3) investigating the compliance by defendant corporations with anti-trust decrees issued by federal courts; (4) reporting, at the direction of the president or either house of Congress, the facts relating to alleged violations of the anti-trust laws; (5) making recommendations for the readjustment of the business of corporations found to be violating the anti-trust statutes; and (6) studying foreign trade conditions and practices affecting the foreign trade of the United States, and reporting recommendations to Congress.

This new Commission, like its prototype, the Interstate Commerce Commission, is outside, and quite independent of, any executive department. It consists of five persons appointed by the president and Senate for seven-year teams.³ It has the assistance of a staff of nearly three hundred persons, organized in five separate and largely independent divisions: (1) the legal division, having charge of the work relating to the prevention of unfair methods of competition, cases of price-discrimination, tying contracts, corporate-stock acquisitions, and interlocking directorates; (2) the economic division, organized primarily to conduct general inquiries called for by the president, by Congress, or by the Commission itself—work previously performed by the bureau of corporations; (3) the export trade division, charged with the administration of

Staff organ-
ization

¹U. S. *Compiled Statutes* (1918), pp. 1429-1435; *Code of the Laws of the U. S.* (1926), pp. 356-361. See J. A. Fayne, "The Federal Trade Commission: the Development of the Law Which Led to Its Establishment," *Amer. Polit. Sci. Rev.*, IX, 57-75 (Feb., 1915); G. Hankin, "Validity and Constitutionality of the Federal Trade Commission Act," *Illinois Law Rev.*, XIX, 17-43 (May, 1924); *ibid.*, "The Jurisdiction of the Federal Trade Commission," *California Law Rev.*, XII, 179-205 (Mar., 1924).

²See F. H. Levy, "The Sherman Law Is Outworn. It Should be Amended," *Virginia Law Rev.*, XIII, 597-610 (June, 1927).

³Salaries are fixed at \$10,000.

the Webb-Pomerene, or Export Trade, Act of 1918 and with the duty of studying foreign trade conditions and practices generally; (4) the division of trade practice conferences, through which representatives of various industries, as units, are brought together to adopt their own rules for the elimination of "unfair, wasteful, and bad" methods of competition in their several industries; and (5) the administrative division, which keeps the records and attends to the routine business of the Commission, and is made up of units usually found in other administrative agencies of the government. Space does not permit setting forth in further detail the functions of these divisions or the methods of procedure followed by the Commission in the performance of its quasi-judicial duty of passing upon complaints of unfair competitive methods.¹ Suffice it to say that if, upon investigation, the Commission finds an unreasonable combination or contract in restraint of trade, or a party guilty of unfair competitive methods, or other violations of the anti-trust laws, the offenders are summoned before it and proceedings assume a quasi-judicial character, as before the Interstate Commerce Commission. A formal hearing upon the charges takes place, after which an order is issued embodying the conditions to be fulfilled if the offender wishes to come under the protection of the laws and escape prosecution before the courts. Appeals may be taken to the circuit court of appeals, and ultimately to the Supreme Court; but an order of the Commission, when accepted by the parties, or when sustained after appeal to the courts, has full force of law.²

¹ Interesting information on these points is to be found in the Commission's *Annual Reports*, together with a list of trade practices condemned by the Commission. A convenient summary of the powers and duties of the Commission may be found in the *Congressional Directory*, 70th Cong., 1st Sess., 377-379 (Dec., 1927). See also R. J. Swenson, *The National Government and Business* (New York, 1924), Chap. xxii; W. S. Holt, "The Federal Trade Commission," *Service Monographs*, No. 7 (New York, 1922).

² Recently the Commission has been severely criticised on several grounds, but especially on account of the adoption of a new rule which reduces the amount of publicity attending the filing of complaints (*Annual Report for 1927*, pp. 111-113). These criticisms, as well as estimates of the value of the Commission in general, may be found in the following references: W. C. Redfield, "Where the Federal Trade Commission Failed," *Nation's Business*, XIII, 28-29 (May, 1925); J. L. Meehem, "A Change in Policy in the Federal Trade Commission," *Amer. Bar Assoc. Jour.*, XI, 637-642 (Oct., 1925); L. Haines, "Degeneration of the Federal Trade Commission," *Searchlight on Congress*, X, 3-22 (July, 1925); W. H. S. Stevens, "What Has the Federal Trade Commission Accomplished?" *Amer. Econ. Rev.*, XV, 625-651 (Dec., 1925); G. C. Lay, "The Federal Trade Commission: Its Origin, Operation, and Effect," *Amer. Law Rev.*, LX, 338-361 (May-June, 1926); M. W. Watkins, "The Federal Trade Commission: a Critical Survey," *Quar. Jour. Econ.*, XL, 561-585 (Aug., 1926); G. H. Montague, "Anti-Trust Laws

CHAP.
XXVIIIClayton
Anti-trust
Act (1914)

The Congress which created the Federal Trade Commission also passed, at the same session, the Clayton Anti-Trust Act to supplement and reinforce both the Sherman law of 1890 and the Federal Trade Commission Act.¹ The measure sought chiefly (1) to define more clearly and forbid certain abuses, discriminations, and restraints of trade, and to empower the Federal Trade Commission to suppress them; (2) to put the injured party in such cases, and in others arising under the original anti-trust law, in a stronger position by making it easier for him successfully to prosecute his suit; and (3) to undo the effect of decisions of the Supreme Court in certain recent anti-trust cases, notably the *Danbury Hatters' case*,² in which the Court had declared that boycotts instituted by labor organizations were combinations in restraint of trade and thus came within the inhibitions of the Sherman Anti-Trust Act. To meet this last situation, the Clayton act declared that nothing in the anti-trust laws "shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations . . . or to forbid or restrain the individual members of such organizations from carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."³

Before the effectiveness of these new methods of dealing with trusts and with combinations guilty of unfair practices could be given an extended trial, the World War came on, giving rise to conditions which, since its termination, have seemed to justify Congress in relaxing at certain points the restrictions of the anti-trust

The Webb-
Pomerene
Act (1918)

and the Federal Trade Commission, 1914-1926," *Amer. Bar Assoc. Jour.*, XIII, 328-335 (June, 1927); C. W. Dunn, "The Country's Nine Years Experience with the Federal Trade Commission," *Economic World*, CXII, 472-476 (Oct. 6, 1923). The most exhaustive and impartial study of the work of the Commission down to 1924 is G. C. Henderson, *The Federal Trade Commission* (New Haven, 1924).

¹ H. R. Seager, "The New Anti-Trust Acts," *Polit. Sci. Quar.*, XXX, 448-462 (Sept., 1915).

² *Loewe v. Lawlor*, 208 U. S., 274 (1908). See also *Bucks Stove and Range Co. v. Gompers*, 221 U. S., 418 (1911).

³ *U. S. Compiled Statutes* (1918), p. 1426, § 8835; *Code of the Laws of the U. S.* (1926), p. 353, § 17; *United Mine Workers v. Coronado Coal Co.*, 259 U. S., 344 (1921); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assoc.* (1927), summarized in *Congressional Digest*, VI, 175-176 (May, 1927), *U. S. Daily*, Apr. 12, 1927, p. 423; D. Y. Thomas, "Blanket Liability for Labor Unions," *Curr. Hist.*, XVI, 769-774 (Aug., 1922); F. R. Black, "How Far is the Theory of Trust Regulation Applicable to Labor Unions?" *Washington Univ. Studies*, XI, 347-408 (1924); A. T. Mason, "The Labor Clauses of the Clayton Act," *Amer. Polit. Sci. Rev.* XVIII, 489-512 (Aug., 1924); *ibid.*, *Organized Labor and the Law* (Durham, N. C., 1925).

laws. Under the Webb-Pomerene Export Trade Act¹ passed in 1918, associations organized for the sole purpose of engaging in the export trade, together with their acts and agreements, are not to be deemed illegal under existing anti-trust laws, provided such associations and their agreements are not in restraint of trade in the United States or of the export trade of any domestic competitor of such an association; and provided, further, that they are not guilty of unfair methods of competition. The enforcement of the act falls to the Federal Trade Commission.²

In conclusion, it should again be emphasized that neither the Interstate Commerce Commission nor the Federal Trade Commission has any authority over commercial transactions which take place wholly within a single state. For such domestic commerce each state provides its own regulations, and for their enforcement practically every state has established some administrative board or commission, variously called a railway commission, public utilities commission, or commerce commission. Of a vast number of commercial transactions it is easy to say that they are wholly subject to state control, and of others it is equally easy to say that they are clearly of an interstate nature, which removes them wholly from state control. If all could be so simply classified, few, if any, causes of friction would be likely to arise between the state and national authorities over matters of commercial regulation. Much difficulty of this sort, however, has arisen, because many transactions unfortunately cannot be made to fit into either of two such mutually exclusive categories, on account of the impossibility of drawing a clear line between their intrastate and interstate aspects. Inevitably, therefore, many state commercial regulations which have not been intended to interfere with interstate commerce as such have, nevertheless, indirectly affected this commerce in varying degrees, and for that reason have been challenged in the federal courts as invasions of a field reserved exclusively for congressional regulation.³ As a result of decisions of the Supreme Court in a large number of such cases, it may now be said that state legislation which affects interstate commerce, even indirectly, will be regarded by the Court as null and void

Relation of
state and
national
control

¹ *U. S. Compiled Statutes* (1918), p. 1435; *Code of the Laws of the U. S.* (1926), pp. 356-361.

² The various anti-trust prosecutions for the year ending June 30, 1927, are reviewed in *U. S. Daily*, Nov. 14, 1927, p. 2615, and in *Annual Report of the Attorney-General* (1927), 21-29.

³ J. P. Hall, *Constitutional Law*, 289-301.

unless it clearly falls within one or another of three narrowly restricted classes.¹

The first class includes cases in which state regulation can be justified as having for its main object the public convenience of the state's citizens; as, for example, laws which, without discriminating against interstate traffic, prohibit Sunday freight trains, or require passenger trains to stop at county seats and other populous places. The second class comprises a vast number of state laws enacted under the police power for the protection of public health, morals, and safety; for example, laws requiring locomotive engineers to be examined and licensed by state authorities, regulating the heating of passenger cars, establishing quarantines against diseases, and requiring that guards be stationed at crossings and bridges. In the third class are found state commercial regulations which are primarily local in their application, although they also affect interstate commerce incidentally; for example, laws regulating pilotage² and the use of wharves, piers, and docks; laws providing for the improvement of navigable channels, for the construction of dams and bridges across navigable streams,³ and for the establishment of ferries; and laws authorizing the fixing of maximum charges for storing grain in warehouses and elevators.⁴ Only in the enactment of regulations which fall within this third class may the states be said to have concurrent jurisdiction with Congress over *any* phase of interstate commerce. Even such local state regulations may remain in force only so long as Congress fails to legislate upon the matters with which they deal; and they may be modified at any time, or superseded altogether, by congressional action. Moreover, it is not always certain that such local regulations will be sustained by the courts, even in the absence of conflicting national laws; for the Supreme Court has more than once held that the absence of national legislation upon commercial matters covered by local regulations indicates an intention on the part of Congress that these particular phases of commerce, so far as they have an interstate bearing, shall remain open and unrestricted.⁵

¹ W. W. Willoughby, *Constitutional Law of the United States*, II, Chap. XLII.

² *Cooley v. Wardens of the Port*, 12 Howard, 299 (1851).

³ *Escanaba Co. v. Chicago*, 107 U. S., 678 (1882).

⁴ *Munn v. Illinois*, 94 U. S., 113 (1876).

⁵ Recent state legislation for the regulation of interstate motor transportation has given rise to new problems as to the dividing line between state and federal jurisdiction. See C. M. Kneier, "The Regulation of Interstate

The text for the foregoing lengthy description of ways in which the national government has sought to regulate foreign and interstate commerce is found in a single brief provision of the constitution—the so-called commerce clause. There are, however, four other express grants of authority in that instrument which so closely concern commerce and business generally that they may be dealt with appropriately in this chapter. These four ancillary powers are: (1) the power to establish uniform laws on the subject of bankruptcy,¹ (2) the power to fix the standards of weights and measures,² (3) the power to promote the progress of science and the useful arts by granting patents and copyrights,³ and (4) the power to establish post-offices and post-roads.⁴

CHAP.
XXVIII
Ancillary
commercial
powers:

Bankruptcy is one of several subjects on which the national and state governments have concurrent legislative power. For a long time it was left largely or entirely to state control.⁵ But in 1898 Congress passed an elaborate bankruptcy act,⁶ with the result that all of the former state laws on the subject have been either repealed or suspended. It is still permissible for a state to legislate on the subject. But in all cases of conflict the national law, of course, takes precedence; and this law is so comprehensive as to leave scant need of concurrent state action. Two classes of bankrupts are provided for in the act of 1898: (a) persons or corporations who voluntarily institute bankruptcy proceedings in order to obtain a distribution of their assets among their creditors and a legal discharge from their obligations; and (b) persons or corporations who, owing debts amounting to \$1,000 or over, may be forced into bankruptcy proceedings by the action of their creditors. Any person, and any corporation except a bank, a railroad, an insurance company, or a municipal corporation, may institute

1. Legisla-
tion on
bankruptcy

Motor Transportation," *Nat. Mun. Rev.*, XVI, 510-518 (Aug., 1927); I. S. Rosenbaum and D. E. Lilienthal, "Motor Carrier Regulation: Federal, State, and Municipal," *Columbia Law Rev.*, XXVI, 954-987 (Dec., 1926); *U. S. Daily*, Jan. 18, 1928, p. 3255.

¹ Art. I, § 8, cl. 4.

² Art. I, § 8, cl. 5.

³ Art. I, § 8, cl. 8.

⁴ Art. I, § 8, cl. 7.

⁵ Before the enactment of the present law, national bankruptcy laws were in force only in 1801-03, 1841-43, and 1867-78.

⁶ *U. S. Compiled Statutes* (1918), pp. 1548-1562; *Code of the Laws of the U. S.* (1926), pp. 243-256; S. W. Dunscomb, Jr., "The Federal Bankruptcy Law," *Polit. Sci. Quar.*, XIII, 606-616 (Dec., 1898). In 1926 Congress adopted extended amendments to the act of 1898: *Code of the Laws of the U. S.* (1926), pp. 1915-1922; R. H. Colin, "An Analysis of the 1926 Amendments to the Bankruptcy Act," *Columbia Law Rev.*, XXVI, 789-808 (Nov., 1926).

voluntary bankruptcy proceedings. Involuntary proceedings may be commenced against any person or corporation, with the exceptions just noted and the further exception of farmers and wage-earners.

Proceedings in bankruptcy cases come under the jurisdiction of the federal district court of the district in which the bankrupt resides. Most of the details in a case are attended to by a referee in bankruptcy, who is appointed by the judge of the district court, and who makes detailed reports to the court from time to time in accordance with the law. After a bankrupt's assets have been inventoried and equitably distributed among his creditors, the judge enters a decree discharging him from all further legal liability for debts incurred prior to the commencement of the bankruptcy proceedings. The Supreme Court has made it very clear, however, that the primary object of the bankruptcy law is not the discharge of the bankrupt person or corporation from further legal liability, but the just distribution of the bankrupt's property among his creditors.

The standards of weights and measures which Congress has established by law are those of the metric system, the use of which is optional, and the pound, yard, gallon, bushel, and their derivatives.¹ The fundamental standards of these various units, by which all other standards throughout the United States are tested and corrected, are deposited in the bureau of standards, established in 1901 and now located in the Department of Commerce; and they are made available to the public through copies or duplicates furnished by the national government to the several state governments. Beyond this, the regulation of commercial and trade standards has been left almost wholly to state, county, and municipal laws and ordinances. The testing and research work carried on by the bureau of standards is of high value, not only to commercial, manufacturing, and engineering interests, but to the universities and other scientific institutions of the country as well.²

Our present copyright and patent laws and regulations have come into existence under the constitutional grant of authority to Congress "to promote the progress of science and the useful arts" by securing to authors and inventors, for limited periods,

¹ *U. S. Compiled Statutes* (1918), pp. 1447-1451; *Code of the Laws of the U. S.* (1926), pp. 374-379.

² See *Congressional Directory*, 70th Cong., 1st Sess., 355-357 (Dec., 1927).

“the exclusive right to their respective writings and discoveries.”¹ The administration of the copyright laws falls within the jurisdiction of the division of copyrights of the Library of Congress, and is under the immediate supervision of the register of copyrights.² The patent laws and regulations are administered under the supervision of the commissioner of patents, formerly located in the Department of the Interior, but transferred in 1925 to the Department of Commerce.³

CHAP.
XXVIII

Copyright has been defined as “the exclusive right secured to an author by statute to reproduce and publish his work.” This exclusive right is granted for a period of twenty-eight years, with the right of renewal for an equal period. Books printed in the English language must be typeset in the United States in order to receive the protection of our copyright laws.⁴ Copyright includes the exclusive right to translate, dramatize, and represent the work; and in the case of a musical production, the right to perform it publicly for profit, and also to exact a fixed royalty for its reproduction by mechanical instruments. Copyright thus extends not only to books but also to works of art, charts, maps, musical compositions, cartoons, and photographs. It is granted to every person who applies in conformity with the law; the division of copyright makes no effort to ascertain whether there is any infringement of a previously copyrighted publication or production. Where such infringement occurs, the injured party is obliged to seek redress in a suit for damages, or by injunction proceedings, in the federal courts.

What may
be copy-
righted

Patents may be granted to any person who has invented or discovered “any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country” within a period of two years prior to the filing of the

Patents

¹ A provision, similarly worded, appeared as early as 1683 in William Penn’s “Frame of Government for Pennsylvania.”

² *U. S. Compiled Statutes* (1918), pp. 1532-1547; *ibid.* (1923), pp. 626-630; *Code of the Laws of the U. S.* (1926), pp. 449-456.

³ *U. S. Compiled Statutes* (1918), pp. 1525-1532; *ibid.* (1923), p. 630; *Code of the Laws of the U. S.* (1926), pp. 1165-1173. See *Congressional Digest*, VI, 255-283 (Oct., 1927), series of articles on “The Problems of Copyright Revision.”

⁴ G. H. Thring. “The United States Copyright Law and International Relations,” *No. Am. Rev.*, CLXXXI, 69-89 (July, 1905).

application for the patent.¹ Once a patent has been issued, it is out of the jurisdiction of the Patent Office; questions of infringement, the scope of the patent, and any other questions that arise out of the grant are determined in the federal courts. The term for which a patent runs is seventeen years. During that period a patent-grant gives the inventor the right to exclude all others from making, using, or selling his invention; but it does not give him the right to make use of or sell his own invention if it is an improvement on some unexpired patent whose claims are infringed thereby. The protection of the patent law extends throughout the continental United States, Alaska, Hawaii, and the Canal Zone; and, upon compliance with certain regulations, to Porto Rico, the Philippine Islands, the Virgin Isles, and Guam.²

Scope of
patent
rights and
copyrights

The rights secured by authors and inventors under the copyright and patent laws are clearly monopolistic: "the exclusive right to their respective writings and discoveries" is what the constitution expressly guarantees. But what is the scope of these "exclusive rights"? How far in the exercise of them may the owner of a copyright or patent go in imposing restrictive conditions upon the sale or use of his writing or invention? When, if at all, will the exercise of these exclusive rights bring him into collision with the anti-trust laws prohibiting contracts in restraint of trade? These and other similar or related questions have several times been before the Supreme Court for decision; and they have received somewhat inconsistent answers.³ In a rotary mimeograph case, for example, decided in 1912,⁴ the Court held that patent rights include the legal right to sell the patented article under any conditions or terms which the owner of the patent may choose to impose, and that they even extend so far as to permit him to prescribe that the article shall be used only with certain materials of his own manufacture or under his control, although unpatented themselves. In this case the owner of the mimeograph patent had required purchasers of his mimeograph machine to agree to use with it only stencil-paper, ink, and other unpatented supplies made by the owner of the patent. This decision of the Court was reached by a four-to-three vote of the justices, there being two vacancies at

¹ *U. S. Compiled Statutes* (1918), p. 1526, § 9430; *Code of the Laws of the U. S.* (1926), pp. 1165-1173.

² K. Fenning, "Trade Marks and the U. S. Patent Office," *Amer. Bar Assoc. Jour.*, XI, 461-464 (July, 1925).

³ J. T. Young, *The New American Government and its Work* (1913), pp. 154-160.

⁴ *Henry v. A. B. Dick Company*, 224 U. S., 1.

the time. It aroused wide criticism, for it seemed to open up the possibility of subverting, under cover of patent rights, much that had been accomplished under the anti-trust laws in checking contracts in restraint of trade.

CHAP.
XXVIII

On the other hand, when, in the following year (1913), similar questions came before a full bench of justices, involving the validity of price-fixing agreements for the sale of a patented medicine and of copyrighted books, different conclusions were reached. In the first of these cases,¹ the Court held that when a patentee has sold a patented article he has placed it beyond the limits of the "exclusive rights" secured by the patent, and that contracts to maintain a standard price therefor are in restraint of trade and accordingly prohibited by the anti-trust law. The same principle was applied in the case involving an attempt by an association of publishers, who owned the copyright of certain books, to uphold and enforce, as a copyright privilege, an agreement to refuse to supply their copyrighted books to retailers who sold them for less than the standard price fixed by the publishers.² The Court held that ownership of a copyright gives publishers no control over the books after they have sold them to a retailer; that the latter, having made them his property, can re-sell them at any price; and that the anti-trust laws prohibit agreements among copyright owners to refuse to sell to persons who re-sell at less than a standard price. In 1914 Congress included in the Clayton Anti-Trust Act a clause which counteracted the possible disastrous effects of the decision in the mimeograph case by forbidding the sale or lease of patented or unpatented articles, or fixing prices therefor, "on the condition or understanding that the purchaser or lessee shall not use" the goods of competitors, "when the effect of such an agreement or lease may be to lessen competition or create a monopoly;" and in a later case (1917) the Supreme Court took exactly the opposite position from that taken in the mimeograph decision.³

Price-fixing
under
patents
and copy-
rights

Even more clearly related to the power of Congress over commerce than are the express powers to pass uniform bankruptcy laws, establish standards of weights and measures, and grant copyrights and patents, is the power to establish post-offices and post-

4. Postal
power

¹ *Bauer and Co. v. O'Donnell*, 229 U. S., 1 (usually called the Sanatogen case).

² *Straus and Straus v. American Publishers Assoc. et al.*, 231 U. S., 222.

³ *Motion Pictures Co. v. Universal Film Co.*, 243 U. S., 502. *Cf.* D. L. Podell and B. S. Kirsh, "Patent Pools and the Anti-Trust Laws," *Amer. Bar Assoc. Jour.*, XIII, 430-434 (Aug., 1927).

roads. So intimate, in fact, is the connection between commerce and the postal service that had the express grant just mentioned been omitted from the constitution, Congress might have established a postal system under power implied in the commerce clause.

The primary function of the postal system is, of course, to collect, transport, and distribute, letters, cards, newspapers, periodicals, and other mailable matter. This is an activity in which the several states once had a right to engage. Since the adoption of the national constitution, however, it has belonged exclusively to the federal government. Furthermore, all the early doubts as to the constitutional authority of Congress to *create* an elaborate postal system, instead of merely designating which of existing buildings and routes were to be used as post-offices and post-roads, have long since vanished. Under its authority both to establish post-offices and post-roads and to regulate interstate commerce, Congress has passed laws excluding from the mails lottery tickets and advertisements, the letters, papers, advertisements, or other documents of persons or corporations practising fraud and deception, and writings of many kinds which tend to encourage crime or immorality.¹ Matter which has thus been excluded from the mails may, however, be distributed in some other way, by private agencies, unless, as in the case of lottery tickets, its transportation in interstate commerce has been prohibited by Congress.

Expansion
of postal
functions

To these primary functions of the postal service have been added (1) the operation of a system of money orders for the transfer of funds, (2) the maintenance of postal savings banks, and (3) the carrying on of an express business, in the form of the well-known parcel-post service. It is safe to say that no activity of the national government now touches more people, in a greater variety of ways, and more continuously. From being merely a device for the transportation of letters and a few newspapers, the service has expanded into the highly complex system which today employs approximately three hundred and thirty thousand persons.² And the resources of the postal power are not yet exhausted, as is illustrated by the fact that it was the postal clause of the constitution that supplied the legal basis for the act of 1916 by which great sums of money were appropriated from the national treasury for the improvement of highways throughout the country in coöperation

¹ *U. S. Compiled Statutes* (1918), pp. 1702-1709; *Code of the Laws of the U. S.* (1926), pp. 483-490, 1235-1286.

² The organization and operation of the Post-Office Department have been described in an earlier chapter. See pp. 322-327.

with the states.¹ The law of 1916 was entitled "An act to provide that the United States shall aid the states in the construction of *rural post-roads*, and for other purposes;" and a "rural post-road" was defined to mean "any public road over which the United States mails now are, or may hereafter be, transported," in places of less than 2,500 population.² More recent highway acts, however, have omitted this invocation of the postal clause.³

CHAP.
XXVIII

REFERENCES

- A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), I, 263-265, Chinese Immigration and Exclusion; 336-344, Commerce, Governmental Control of; 468-469, Copyrights; II, 143-148, Immigration; 218-229, Interstate Commerce; 651-652, Patents; 761-767, Postal Service; III, 140-148, Railroads; 510-511, Telegraphs, Telephones; 576-581, Trusts; 667-668, Weights and Standards.
- E. Kimball, *National Government of the United States* (Boston, 1920), Chap. XIX.
- W. W. Willoughby, *Constitutional Law of the United States* (New York, 1910), II, Chaps. XLI-XLIV.
- C. K. Burdick, *Law of the American Constitution* (New York, 1922), Chap. VIII.
- J. T. Young, *The New American Government and its Work* (rev. ed., New York, 1923), Chaps. VI-X.
- W. Thompson, *Federal Centralization* (New York, 1923), Chaps. v, VII, XII-XIV.
- R. J. Swenson, *The National Government and Business* (New York, 1924), Chaps. XII-XXIV.
- E. W. Crecraft, *Government and Business* (Yonkers, 1928).
- F. J. Goodnow, "The Power of Congress to Regulate Commerce," *Polit. Sci. Quar.*, XXV, 220-256 (June, 1910).
- T. R. Powell, "Commerce, Congress, and the Supreme Court," *Columbia Law Rev.*, XXVI, 396-431, 521-549 (Apr.-May, 1926). A conspectus of Supreme Court decisions, November, 1922, to June, 1925.
- G. C. Reynolds, *The Distribution of Power to Regulate Interstate Carriers Between the Nation and the States* (New York, 1928).
- E. R. Johnson, *American Railway Transportation* (2nd ed., New York, 1910), Chaps. XXV-XXIX.
- F. H. Dixon, *Railroads and Government* (New York, 1922).
- F. N. Judson, *The Law of Interstate Commerce and its Federal Regulation* (3rd ed., Chicago, 1916).

¹ See p. 562.

² W. Thompson, *Federal Centralization*, Chap. v. Something in the nature of a precedent for this resort to the postal clause to justify a federal highway policy is to be found in the history of internal improvements in the early decades of the past century; especially in the report of Albert Gallatin, in 1808, outlining a system of highways and canals extending from Massachusetts to Georgia.

³ *Code of the Laws of the U. S.* (1926), pp. 665-670.

- E. P. Prentice, *The Federal Power over Carriers and Corporations* (New York, 1907).
- F. Frankfurter, *A Selection of Cases under the Interstate Commerce Act* (Cambridge, 1922).
- L. Rogers, "The Postal Powers of Congress," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XXXIV, 149-337 (1916).
- E. W. Kemmerer, *Postal Savings: History and Critical Study of the Postal Savings System of the United States* (Princeton, 1917).
- J. W. Jenks and W. E. Clark, *The Trust Problem* (4th ed., New York, 1912), Chaps. XIII-XV.
- E. Jones, *The Trust Problem in the United States* (New York, 1921).
- W. H. Taft, *The Anti-Trust Act and the Supreme Court* (New York, 1914).
- G. C. Henderson, *The Federal Trade Commission* (New Haven, 1924).
- J. W. Jenks and W. J. Lauck, *The Immigration Problem* (3rd ed., New York, 1913).
- The Constitution of the United States as Amended to December 1, 1924*, 68th Cong., 1st Sess., Sen. Doc. 154 (1924), 82-202, 208-212, 216-225.
- Acad. Polit. Sci. Proceedings*, VIII, 1-262 (Jan., 1920). Series of articles on railroad legislation, with special reference to recent government operation in the United States.
- , IX, 15-60, 89-98, 116-128 (Feb., 1921), "American Foreign Trade Relations."
- Annual Reports of Interstate Commerce Commission, Federal Trade Commission, Tariff Commission, and Commissioner-General of Immigration.

CHAPTER XXIX

THE EXPANSION OF NATIONAL ACTIVITIES

Any one who has followed the outline of activities of the national government presented in two earlier chapters devoted to the ten executive departments¹ must have been conscious of a shift of scene as the enumeration proceeded. The older departments have had to do, in their original form at all events, with matters of a strictly governmental character and, what is more, with matters coming quite clearly within the range of powers conferred by the constitution upon the national government, *e.g.*, the conduct of foreign relations, the collection and disbursement of national revenues, the management of the army and navy, the administration of justice, the operation of a postal system, the granting of patents, the custody and sale of public lands, and what not. On the other hand, the newer departments—Agriculture, Commerce, Labor,—have to do largely with affairs that until recent times were rarely brought within the purview of governmental authorities in any country, and that under our own constitutional system seem to lie farther and farther out upon the fringe of national jurisdiction, if not entirely beyond its limits. The result is the same if one scrutinizes the work of Congress as described in the four chapters immediately preceding the present one. Here, again, we start with certain plainly necessary and clearly granted powers or functions, *e.g.*, levying taxes, coining money, regulating foreign and interstate commerce, but presently find ourselves talking about creating national banks, laying protective tariffs, regulating immigration, curbing trusts. How is it that national meat inspectors today find themselves stationed in the slaughter-houses of the great packing establishments of Chicago? Or that a Pennsylvania farmer can receive market reports sent out from a national high-powered radio station at Arlington, Virginia? Or that a Gloucester fisherman can look to the government at Washington to tell him to use copper oleate as a means of preventing his nets from rotting? Or that a Mississippi planter can obtain federal aid in eradicating the boll

Extension
of govern-
mental
functions:

¹ Chaps. XIX-XX.

CHAP.
XXIX

weevil and the Texas stockraiser in overcoming the ravages of the cattle tick?

1. By constitutional amendment

The answer, of course, is that, by one means or another, the range of activities of our national government has been extended immeasurably beyond the simple lines laid down and observed in Washington's day, so as to comprehend these, and many other, surprising things. The states and their people have been brought under national control to a degree not previously considered possible. This result has been arrived at in two principal ways, both so familiar as to require no extended comment. The first is by amendments to the national constitution. Most of the nineteen amendments, it is true, have had to do with limitations upon, rather than extensions of, the national powers. But the Fourteenth extended the veto power of the national judiciary over many actions of the states not previously covered; the Sixteenth conferred the power of levying income taxes without apportionment; and the Eighteenth empowered the national government to prohibit the manufacture, sale, and transportation of intoxicating liquors. Other amendments looking in the same general direction, *e.g.*, on the subject of child labor, have been urged though not as yet adopted. Especially significant in this connection is the prohibition amendment. Until its adoption, in 1919, the control of the alcoholic liquor industry was regarded as a matter belonging exclusively to the states under the police power, to be dealt with by each of them absolutely as it chose—subject only to the recognized national power to tax and to regulate interstate commerce. The amendment, however, made prohibition national and led to the creation of a vast new piece of national administrative and enforcing machinery. It was "more than an entering wedge;" it was "a coach and four driven straight through the reserved constitutional rights of the states to regulate their domestic concerns."¹

2. By statute and judicial construction

Even so, formal constitutional amendment has played a relatively small part. Far more important has been statute, reinforced by judicial construction. It is the doctrine of implied powers, as generously applied by the Supreme Court, that has opened the way for the growth of the mighty investigative and regulatory system that centers in Washington today. But for this, there would be no pure food and drug acts, no meat inspection acts, no rural credit act, no white slave act, no narcotic drug act, no federal water power act. But for this there would be no Federal Trade Commission, no

¹ W. MacDonald, *A New Constitution for a New America*, 173.

Tariff Commission; and if there were departments of agriculture, commerce, and labor at all, they would have such modest functions as to be hardly worthy of notice. We have seen that the concept of implied powers began to have its effects as early as Washington's first administration.¹ These effects have gone on broadening and deepening ever since. Indeed, the doctrine has been carried so far that it is a fair question whether Congress cannot authorize and make financial provision for a new government service or activity simply on the strength of its power to appropriate money and without any other express or implied provision in the constitution on which to base its action.

CHAP.
XXIX

Of late, the most extraordinary manifestations of the power of Congress to stretch out the long arm of legislation and, with no express (and sometimes no clearly implied) constitutional sanction, displace state control by national control, have taken the form of rapidly multiplying laws providing for federal subsidies, more properly known as grants-in-aid. The principle of the grant-in-aid is that Congress will appropriate money for the furtherance of some social or economic improvement deemed desirable, apportioning the sum among the several states on a stipulated basis, but permitting a state to share in the subvention only on two conditions—first, that the state itself will appropriate for the purpose in hand an amount at least equal to its share of the national grant, and second, that the state will accept national supervision or control of the activities for which the money is voted. Sometimes this control amounts to requiring that the states shall enact certain legislation in order to qualify for participation in the grant; almost always it means that a state must reconstruct its administrative machinery so as to make way for surveillance and control by national officers over matters that formerly were entirely in its own hands. No direct compulsion is exercised. A state may, if it likes, decline to meet the conditions imposed, in which event it simply does not participate in the federal fund; and this voluntary aspect of the plan has helped the courts get around the constitutional difficulties which some of the legislation, dealing with matters lying well outside the range of federal competence, presents. Compliance by the states is, however, less voluntary than it seems. For the federal fund represents the proceeds of taxes paid by the people of the entire country, and if any state refuses to go into the arrangement, it thereby denies itself

Grants-
in-aid

¹ See p. 128.

the benefits which its taxpayers are helping to bestow on the states that go in. Naturally, it will be reluctant to do this.

Grants-in-aid by the national government are, of course, by no means a novelty. Beginning with Ohio in 1802, Congress regularly bestowed on newly admitted states land within their boundaries equivalent to one section in every township, to be used for educational purposes—in fact, two sections after 1848, and even four in the cases of Utah, Arizona, and New Mexico.¹ Numerous other forms of land grants, applying to salt lands, swamp lands, etc., were introduced at different points in the country's history; and an especially notable piece of legislation—the Morrill Act of 1862—set aside for the benefit of each state, in proportion to its representation in Congress, a vast stretch of public land (ultimately 10,840,000 acres), stipulating that the proceeds should be used in endowing and maintaining one or more colleges devoted primarily, although not necessarily exclusively, to instruction in “such branches of learning as are related to agriculture and the mechanic arts.”² The funds derived from this source go far toward supporting our numerous “land-grant” colleges today. Not land alone, but also money, was early bestowed; and not only for education, but also for roads and canals. When, indeed, in 1836 it was found that unexpected receipts from the sale of public lands were yielding a surplus of some nine million dollars a year a law was passed under which, in 1837, the sum of twenty-eight millions was distributed among the states in proportion to their congressional representation, in the guise of a loan, but with no expectation that it would be paid back, and with no stipulation whatever as to how it should be used.³

Since about 1885 there have been two main developments in this matter. One is the remarkable increase of the volume and variety of the federal aid extended; the other is the equally remarkable extension of federal control over the use of the funds allotted. Inevitably, the two have gone along together.

No field better illustrates what has happened than that of agricultural education. The Morrill Act of 1862 imposed no obligation upon the state accepting the grant beyond maintaining at least one agricultural college and making an annual report to Congress upon the institution's progress and upon the condition

¹ The Congress of the Confederation had, indeed, provided in 1785 for such a subvention in the Northwest Territory.

² 12 U. S. Stat. at Large, 503.

³ E. G. Bourne, *History of the Surplus Revenue of 1837* (New York, 1885).

of the fund. Many of the states parted with their lands at ridiculously low prices; hence in 1889 Congress forbade states subsequently entering the Union to sell for less than ten dollars per acre; and—what was more important—a statute of 1890, granting each state an annual money appropriation in further aid of the agricultural and mechanical colleges, empowered the secretary of the interior to satisfy himself that the subsidized institutions of each state were fulfilling their purposes before permitting the annual allotment to be paid. Federal supervision that meant something was thus introduced, and in 1907 it was farther strengthened by an act increasing the subsidy and entrusting administration of the laws to the national bureau of education. Meanwhile, in 1887, Congress had given each state a lump sum for the maintenance of an agricultural experiment station, and an act of 1906 increased the allowance and greatly extended federal control as exercised through an office of experiment stations in the Department of Agriculture.

Then came a departure of still greater importance. About 1900 the Department of Agriculture began sending agents into the South to demonstrate improved methods of growing crops. The service was so much appreciated that in a few years counties began contributing voluntarily toward the salaries of the experts, and in 1912 an appropriation by Congress enabled the plan to be extended to northern and western states. Finally, in 1914, the Smith-Lever Act appropriated \$480,000 for 1915-16 and pledged amounts rising by stages to \$4,580,000 in 1922-23 for the purpose of giving "instruction and practical demonstrations in agriculture and home economics to persons not attending or resident in colleges in the several communities."¹ Each state was to receive a basic grant of \$10,000 annually, and beyond that the subsidy of each year was to be divided among the states in the proportion which the rural population of each state bore to the rural population of all the states; in other words, the agricultural population, not states as such, was to be the main basis of distribution. This was something new. But more important still was the provision that no state should share in the distribution until it accepted the terms of the act and appropriated or otherwise provided a sum equal to that (beyond the basic allowance) due it from the federal grant. Here was embodied the rule of "matching the federal dollar" which (originally introduced in a forest-fire prevention act three years previously) has been incorporated in practically all subsequent

Coöperative
agricultural
extension
work

¹38 *U. S. Stat. at Large*, 372.

legislation granting federal aid. Under the terms of the statute, supplemented by voluntary agreements, each of the agricultural colleges now maintains a distinct division for the administration of extension work in agriculture and home economics; the director of this division must be acceptable to the federal Department of Agriculture, to which all plans are submitted; and all funds for agricultural extension work, whether from national, state, or local sources, are administered through this single channel. Locally, the work is carried on chiefly by county agents, in whom the national and state governments merge in truly remarkable fashion. Their pay comes partly from the nation and partly from the state; they are responsible to the state extension director, but must conform to national regulations; they are at once expert advisers, business agents, and social workers.¹

Other
spheres of
federal aid
and control

Extensive and significant as the coöperative arrangements of state and nation now are in the domain of agricultural education, they are duplicated, and in some instances exceeded, in several other fields. A complete catalogue would be wearisome, even though instructive; but here are some outstanding examples.

1. The Weeks Act of 1911² put at the disposal of the forest service in the Department of Agriculture a sum of money (increased by subsequent legislation) to be used for fire protection in forest lands situated on watersheds of navigable rivers, under the condition that the federal expenditure in any state should not exceed in any fiscal year the state appropriations for the same purpose.

2. A Federal Highway Act of 1916³ provided for an appropriation rising by stages to the sum of \$25,000,000 in 1921, to be expended by the bureau of roads in the Department of Agriculture, in coöperation with the highway departments of the several states, in the construction of rural post-roads. Congress had subsidized the states for the benefit of post-roads before; but the plan now adopted was a landmark in the history of federal and state relations because of the requirement that the states should match the amounts apportioned to them from the federal treasury, and because the national government was given a control over the con-

¹ At first the direction of these extension activities, on the side of the national government, was vested in a "states relations service," in the Department of Agriculture; but in 1923 this service was abolished and its work assigned to three distinct bureaus or services, *i.e.*, the extension service, the office of experiment stations, and the bureau of home economics.

² 36 *U. S. Stat. at Large*, 961.

³ 39 *U. S. Stat. at Large*, 355.

struction and maintenance of coöperative roads that was little short of absolute. Every state in the Union accepted the provisions of the act, and under the federal impetus road construction went forward on a scale never before witnessed.

3. In the same year a National Defense Act,¹ carrying farther the principle of national supervision over the military establishments of the several states embodied in the Militia Act of 1903, discarded the old term "militia," substituted the significant name "National Guard," and welded the various bodies of state troops into a unified, nationally organized, force auxiliary to the regular army, and similarly equipped and disciplined. Federal aid is extended on the same general lines as in the foregoing instances, and federal standards are even more strictly enforced.²

4. The Smith-Hughes Vocational Education Act of 1917³ appropriated liberal sums to be employed, on the usual terms, in helping the states pay the salaries of teachers of trade, home economics, and industrial subjects, and train teachers, supervisors, and directors in these subjects. The system operates in all of the states and is administered by a federal board for vocational education whose powers enable it to enforce uniform standards and methods from coast to coast.⁴

5. Departing still farther from precedent—and from both letter and spirit of the constitution—Congress in 1918 began furnishing money to assist the states in fighting venereal diseases;⁵ although lack of funds brought this arrangement practically to an end in 1924.

6. An Industrial Rehabilitation Act of 1920 put fresh sums at the disposal of the federal board for vocational education, to be used in aiding the states—again on the principle of dollar for dollar—in promoting "vocational rehabilitation of persons disabled in industry or in any legitimate occupation and their return to civil employment."⁶

7. Finally (without exhausting the list), the Sheppard-Towner Act of 1921 extended federal financial aid to the states in the work of reducing infant and maternal mortality and protecting the health of infants and mothers, on the usual conditions that the

¹ 39 *U. S. Stat. at Large*, 197.

² See p. 317.

³ 39 *U. S. Stat. at Large*, 929.

⁴ W. S. Holt, "The Federal Board for Vocational Education," *Service Monographs*, No. 6 (New York, 1922).

⁵ 40 *U. S. Stat. at Large*, 886.

⁶ 41 *U. S. Stat. at Large*, 735.

CHAP.
XXIX

legislatures accept the terms of the measure and comply with them by appropriations and in other ways.¹ No previous step had carried the national government so far into the field of social legislation—a domain so recently occupied almost exclusively by the states. Within six months after the act was passed, however, forty-one states agreed to its provisions and took steps to meet its requirements. In 1927 all states were coöperating except Massachusetts, Connecticut, and Illinois.

The ques-
tion of
"centraliza-
tion"

No one who keeps touch with the currents of thought and discussion in the country today needs to be told that the amazingly rapid expansion of national activities, so strikingly illustrated by the subsidy system just outlined, has become a major public issue. Press and platform pronounce sententiously on "federal usurpation"; a leading university president assures us that we are passing through "a second American revolution;"² party platforms hark back to the old question of states' rights; every great social or economic reform is discussed largely, if not primarily, from the viewpoint of its centralizing or decentralizing tendency. When the child labor amendment to the national constitution was put before the states, it immediately became the focal point for a fundamental debate on the entire American plan of government; and undoubtedly the defeat of the proposal was to some extent due to a popular reaction against national domination in general, as well as to dissatisfaction with that particular form of such domination embodied in the prohibition law.³ Nothing shows more plainly the perpetually shifting character of political systems, and the methods by which great changes are accomplished in our own system, than the developments going on before our very eyes in this broad field of federal and state relations.

Criticism
of the
present
tendency

On the one hand, it is argued (1) that the only proper system for a land of continental proportions and a people of vast numbers and divergences is one—such as the makers of the constitution had in mind—which allows a great measure of local, *i.e.*, state, autonomy and restricts centralized, uniform, national control in social and economic matters to a minimum; (2) that even if Congress has the constitutional right to regulate on certain of the present and

¹ 42 U. S. Stat. at Large, 224.

² Nicholas Murray Butler, in N. Y. Times, Oct. 14, 1924.

³ W. L. Chenery, "Children in Politics," *Century Mag.*, CIX, 599-605 (Mar., 1925); E. F. Trabue, "The Proposed Twentieth Amendment to the Constitution—a Vicious Step toward Centralization of Power," *Amer. Law Rev.*, LXI, 205-216 (Mar.-Apr., 1927).

proposed lines, it is not wise, or even safe, for it to insist upon acting, especially in the domain of police power heretofore supposed to be occupied mainly or entirely by the states; (3) that the national government is becoming top-heavy because entrusted with so many tasks and is not fitted to take on any more responsibilities; (4) that the state governments are more natural and effective agencies of control because closer to the problems and persons concerned, and (5) that in seeking to enforce uniform standards through an ever-widening network of federal law, backed up by steadily expanding federal administrative machinery, Congress is strangling the states and reducing them to mere local areas charged only with "the neat and humble care of detail in obedience to a nationally determined policy;" and we hear the governor of one of the states solemnly calling upon his fellow citizens "to resist unwarranted encroachments of every kind by the federal government upon the sovereign rights of our state and the guaranteed liberties of our people."¹ The policy of subsidies, as applied in later years, is specially opposed on the additional ground (1) that through it the national government, in effect, buys the right of compelling and supervising activities over which it would otherwise have no power of control; (2) that the system encourages manipulation and vote-trading in Congress for special favors for particular localities or interests; (3) that, in addition to depriving the states of their just powers, it begets the habit of relying on doles and encourages the demoralizing notion that the government at Washington owes every business and profession a living; (4) that "federal aid" is a misnomer, since all that the federal government does is to take money from the people of the states, in the form of taxes, put it in the general fund, draw it out again, and give it back, in somewhat changed proportions; and (5) that the richer states are made to bear most of the burden and progressive states are penalized for the benefit of more backward ones.

On the other side, it is contended, on general lines, (1) that time, inventions, and other forces have so thoroughly nationalized the United States that most fundamental social and economic interests are no longer local, but instead cut across state and sectional boundaries, and are of common concern to the entire country; (2) that along with this great change of conditions has gone a cor-

Counter-arguments

¹ Governor A. C. Ritchie, of Maryland, in his second inaugural, quoted in W. C. Redfield, "Federal Usurpation," *Forum*, LXXIII, 88 (Jan., 1925). Cf. A. C. Ritchie, "Back to States' Rights," *World's Work*, XLVII, 525-529 (Mar., 1924).

responding change of political thought, so that people no longer expect or desire the separation that prevailed in earlier and simpler days; (3) that the states have not been so efficient as to have demonstrated their right to be let alone in matters of deep human concern;¹ (4) that so long as social and economic conditions arise which, if they are to be regulated at all, must be regulated by the national government, it is of no avail to say that the national government is unfitted to take on more responsibilities, the proper course being, rather, to reconstruct that government so as to remedy the deficiency; and (5) that, in general, it is futile to expect the constitutional system of a great, growing, changing country such as ours to stand still. The policy of grants-in-aid and of resulting control is specially defended on the ground (1) that it sets up minimum national standards in important fields of social and economic regulation, for the good of the people of the country as a whole; (2) that it divides burdens which states are often unable to bear alone, quite justifiably requiring the richer states to help the poorer ones improve conditions in which all have a large common interest; (3) that it makes for economical expenditure of federal funds and, by imposing reciprocal obligations, checks the scramble for public money which invariably takes place when such money is given out without creating local responsibilities, as in the case of river and harbor appropriations; (4) that the initiative and autonomy left to the states permit of plasticity and tend to prevent the rise of a centralized bureaucracy such as has been the curse of certain European nations; and (5) that no state is compelled to come under the federal aid acts, and accordingly the constitutional objections which formerly blocked the setting up of national standards are quietly and effectively overcome.

One who calmly contemplates the arguments pro and con will be impressed by two facts: first, that most of what is said on the subject has a controversial purpose and is colored by the particular interest, prejudice, or point of view of the speaker or writer, and, second, that, accordingly, the discussion is often conducted on very general lines and with regrettable lack of balance and perspective. The capitalist who pays a large income tax may think that the gov-

¹ Speaking before the Pennsylvania Society in New York in 1906, Mr. Elihu Root, then secretary of state, predicted that if the states did not show more evidence of meeting their responsibilities efficiently, sooner or later constructions of the constitution would be found which would "vest the power where it will be exercised—in the national government." C. W. Pierson, *Our Changing Constitution*, 150.

ernment ought to reduce taxes rather than distribute their proceeds in aid of state educational activities; the social reformer, who endorses federal aid for the care of mothers and infants, may have little interest in aid for the protection of forests; the southerner may feel like condemning the entire system because it contravenes states' rights; a political party may consider it good strategy to thunder against the "centralizing" tendencies of its rival.

CHAP.
XXIX

Out of the welter of *ex parte* argument arise certain conclusions. The first is that the subject is not one upon which to dogmatize. The proper attitude is not a generalized opposition or a generalized support, but willingness to consider each form or phase of nationalization on its own merits. A second point is that centralization and decentralization are not mutually exclusive principles, only one of which can be applied at a given time. Large business establishments have found that efficiency requires uniformity and concentration in certain of their operations and quite the reverse in others. So it is with governments. A high degree of centralization in one field is entirely compatible with no centralization at all in other fields. In the third place, the trend toward national control is inevitable, however one may feel about it. It is the universal experience, once national unity has been attained; and the federal system in the United States cannot restrain it any more than such a system has done in Germany or in Switzerland. When, in our own case, social and economic interests develop to a point where they are no longer bounded by state lines but become interstate or national, any attempt to keep up exclusive state regulation not only is hopeless, but, if persisted in, is certain to precipitate a conflict between state power and national power. "The outcome of such a conflict can never be long in doubt. The greater will prevail over the lesser. Any constitutional peg upon which the extension of federal control necessary to meet the new situation can be hung is certain to be availed of; and the federal courts, which always seek to uphold Congress if possible, will stretch the mantle of the constitution to the limit in order to make it cover the exercise of the new authority."¹ Excellent illustration is afforded by the unanimous refusal of the Supreme Court in the case of *Massachusetts v. Mellon* in 1923, to hold the Sheppard-Towner Maternity Act² unconstitutional. Finally, on the other hand, it is to be stressed that so

Merits of
the contro-
versy

¹ W. MacDonald, *A New Constitution for a New America*, 169.

² 262 U. S., 447. See *Amer. Polit. Sci. Rev.*, XVIII, 49-51 (Feb., 1924), and E. S. Corwin, "The Spending Power of Congress—Apropos the Maternity Act," *Harvard Law Rev.*, XXXVI, 548-582 (Mar., 1923).

long as the states exist our governmental system can never become centralized beyond a relatively moderate degree. For, after all, the states are and must continue, in the main, separate political societies, possessing a vast and undefined mass of powers which intimately concern the daily life of the people. These powers may be pared down at one point or another, in a manner even calculated to alarm; yet the bulk remains untouched. And as for the states themselves, in the eyes of the constitution, they are as perpetual as the Union, of which they form inseparable and indestructible parts. The states are still more essential to the existence of the nation than it is to theirs.¹

Differences of opinion on constitutional and political phases of the expansion of national activities in recent decades are inevitable. But certain results are manifest to the most casual observer. One of them is the enormously increased cost of running the national government. A "billion-dollar" Congress was a notable matter two decades ago; nowadays appropriations in a single year more than triple that amount,² and notwithstanding the aid which comes from the new budget system introduced in 1921,³ the task of spending the public money wisely imposes a greater burden on Congress than ever before. A second consequence is that the national government has been led to go into business in active competition with private capitalists and corporations. The War Finance Corporation, originally established in 1918, still functions vigorously as a bank for farmers and exporters and engages in ordinary merchandising business in the handling of cattle and other commodities falling to it from defaulted loans. The Shipping Board, through the Emergency Fleet Corporation established in 1917, operates vessels in the foreign trade in an effort to make profits.⁴ Bills have been before Congress looking to huge government corporations that would deal in farm products; and advocates of keeping the Muscle Shoals project in public hands would have the United States become the greatest power and fertilizer producer in the world.

A third result is the multiplication of investigative, supervisory, and administrative agencies outlined in earlier chapters.⁵

¹ C. Nettels, "The Plea for States' Rights," *New Repub.*, XLI, 191-192 (Jan. 14, 1925).

² In 1923 total governmental expenditures of \$10,045,000,000 (fifteen per cent of the total income of the people in that year) were distributed as follows: nation, \$3,459,000,000; states, \$1,450,000,000; local units, \$5,136,000,000.

³ See pp. 501-509.

⁴ See p. 527.

⁵ Chaps. XIX-XX.

Older executive departments—State, Treasury, Post-Office, Interior—have broadened out as new functions have been added and earlier ones elaborated; the newer departments—notably Agriculture and Commerce—have developed into vast complicated administrative mechanisms; and wholly outside of the ten regular departments has risen a labyrinth of commissions, boards, and special offices of one kind or another, to a number barely short of fifty. Most of the detached agencies are clothed with an amplitude of quasi-judicial and quasi-legislative powers which Congress did not deem it advisable to entrust to a department, bureau, or even, as a rule, to an independent service under the direction of a single officer. Practically every one carries national supervision and control to new lengths in some designated sphere; hardly a Congress fails to add to the list; and the complexity of the executive and administrative system is proportionately augmented. The movement for administrative reorganization and simplification, already described, draws its impetus largely from the existing heterogeneity of administrative arrangements both inside and outside of the ten departments; in turn, this condition is traceable mainly to the increase of national activities in the past twenty-five years.

REFERENCES

- W. MacDonald, *A New Constitution for a New America* (New York, 1921), Chaps. XI, XVI.
- S. Spring, "A New Constitution," *Yale Rev.*, XI, 574-592 (April, 1922).
- E. P. Buford, "Federal Encroachments upon State Sovereignty," *Amer. Law Rev.*, LVII, 801-827 (Nov.-Dec., 1923).
- B. W. Warren, "Destroying our 'Indestructible' States," *Atlantic Monthly*, CXXXIII, 370-378 (Mar., 1924).
- W. C. Redfield, "Federal Usurpation," *Forum*, LXXIII, 88-95 (Jan., 1925).
- P. H. Douglas, "Development of a System of Federal Grants-in-Aid," *Polit. Sci. Quar.*, XXXV, 255-271, 522-544 (June, Dec., 1920).
- B. A. Arneson, "Federal Aid to the States," *Amer. Polit. Sci. Rev.*, XVI, 443-454 (Aug., 1922).
- E. M. Patterson (ed.), "Federal Versus State Jurisdiction in American Life," *Annals Amer. Acad. Polit. and Soc. Sci.*, CXXIX (Jan., 1927).
A group of papers on federal and state relations.
- W. A. Cook, *Federal and State School Administration* (New York, 1927).
- F. Pierce, *Federal Usurpation* (New York, 1908).
- H. L. West, *Federal Power: its Growth and Necessity* (New York, 1918).
- C. W. Pierson, *Our Changing Constitution* (Garden City, 1922).
- W. Thompson, *Federal Centralization: a Study and Criticism of the Expanding Scope of Congressional Legislation* (New York, 1923).

- W. Thompson, "The Trend toward Federal Centralization," *Annals Amer. Acad. Polit. and Soc. Sci.*, CXIII, 172-182 (May, 1924).
- A. F. MacDonald, *Federal Subsidies to the States* (Philadelphia, 1923).
- , *Federal Aid; A Study of the American Subsidy System* (New York, 1928).
- , "The American Subsidy System," *Nat. Mun. Rev.* XIV, 692-701 (Nov., 1925).
- M. N. Orfield, *Federal Land Grants to the States* (Minneapolis, 1915).
- N. M. Butler, *The Faith of a Liberal* (New York, 1924).
- S. Bent, "Bureaucracy Triumphant: Government by Commission at Washington," *Century Mag.*, CXII, 180-189 (June, 1926).
- E. W. Crecraft, *Government and Business* (Yonkers, 1928).

CHAPTER XXX

TERRITORIES, DEPENDENCIES, AND PROTECTORATES

The clause which authorizes Congress to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"¹ was placed in the constitution primarily in order to enable the new government to continue to exercise an important power which had been assumed by the national government under the Articles of Confederation. Without any express grant of authority, the old Congress had provided for the government of the region north and west of the Ohio River, commonly called the Northwest Territory, by enacting in 1787 a fundamental law known as the Northwest Ordinance—probably the most important single measure adopted by Congress during the entire period of the Confederation. The region covered by this ordinance had come into the possession of the United States as a result, not only of the victory in the Revolutionary War, but of a series of cessions made by states which originally claimed various parts of the territory, namely, Massachusetts, Connecticut, New York, and Virginia. The territory was turned over to the United States to be held and administered by the national government for the benefit of the entire country. For its government the Northwest Ordinance was enacted in 1787, and reenacted, substantially unchanged, two years later by the first Congress under the new constitution.

Origin
of the
national
domain

The Northwest Ordinance provided that in the region north and west of the Ohio River there should be a governor, a secretary, and three judges, all appointed by Congress, or, as altered in 1789, by the president and Senate. The officers were empowered to adopt, promulgate, and enforce within the Territory such civil and criminal laws of the original states as they deemed best suited to territorial conditions, subject always to the veto of Congress and the right of that body to legislate for the Territory upon its own initiative. Under this arrangement the inhabitants were not given any voice in governing themselves; but it was intended to be only

Government
under
the North-
west
Ordinance

¹ Art. IV, § 3, cl. 2.

temporary. The Ordinance went on to provide that when the Territory's population should be found to include as many as five thousand free male inhabitants of voting age a legislature should be established whose lower house should consist of members elected, for a term of two years, by the qualified voters. The upper house, called the council, was to be composed of five persons appointed by Congress (after 1789, by the president) from a list of ten persons nominated by the territorial house of representatives and selected from residents of the Territory who owned five hundred acres of land. Their term was five years.

To the governor and these two houses belonged, when this second stage was reached, all the legislative power previously exercised by the five original territorial officers; and the concurrence of the two houses and the governor was necessary to the enactment of laws. Congress retained, as before, the right to veto acts of the legislature and to legislate upon its own initiative. In that body, however, the people of the Territory were not wholly unrepresented, for the Ordinance authorized the two territorial houses in joint session to elect a delegate who should have a seat in Congress and the right to participate in debates, although without any vote. The Ordinance went even farther and included detailed provisions guaranteeing the fundamental civil and political rights of the inhabitants of the Territory, similar to the bills of rights in existing state constitutions.

Importance
of the
Northwest
Ordinance

The importance of the Northwest Ordinance lies not only in the liberal provisions made for local self-government, for representation in Congress, and for the enjoyment of fundamental civil and political rights, but also in the fact that the scheme of government therein outlined became the precedent or model for practically every law afterwards enacted by Congress for the government of our continental possessions; indeed, many of the more essential provisions found in later territorial organic acts were taken over almost bodily from the earlier Ordinance.¹ Of equal, or even greater, importance, however, is the fact that the Ordinance made it perfectly clear that the people of the Territory were not to be kept in perpetual subjection to congressional authority, but that, on the contrary, the territorial government was simply to

¹ In 1790, for example, Congress authorized a government for the region south of the Ohio River, known as the Southwest Territory, which was essentially similar to that provided for in the Northwest Ordinance. In territories organized after 1836 the appointed council forming the upper branch of the legislature was replaced by a popularly elected senate.

serve as a temporary arrangement until the growth of population should warrant the Territory's admission to the Union as a state, or group of states, upon a footing of equality with the other states. In other words, the territorial status was to be regarded merely as preparation for full statehood. Accordingly, the Northwest Territory was divided in 1800 into the "Indiana Territory" and the "Territory Northwest of the River Ohio;" and two years later the greater part of the latter was admitted to the Union as the state of Ohio. Subsequently, from the Territory of Indiana were set off the Territories of Michigan, Illinois, and Wisconsin, each of which was later admitted to the Union. The Southwest Territory underwent a similar splitting up, followed by the admission to statehood of Kentucky, Tennessee, Alabama, and Mississippi.

CHAP.
XXX

All of the territorial governments just mentioned were created in a region inherited by our present national government from the government of the Confederation, and, of course, it was this western expanse that the framers of the constitution had in mind when they expressly authorized Congress to make all needful rules and regulations for the government of territories. It is not clear that the framers had any intention of authorizing the acquisition by the national government of the other regions, even those which were contiguous, in which Congress afterwards set up territorial governments. Nevertheless, repeated decisions of the Supreme Court have settled beyond all question that the right of the national government to acquire territory, although not expressly granted, may be implied from the power to admit new states into the Union, from the power to make treaties, or from the power to carry on war and make peace.¹ Under one or another of these implied powers, Louisiana was acquired in 1803, Florida in 1819, Texas in 1845, Oregon in 1846, California in 1848, Alaska in 1867, Hawaii, Porto Rico, and the Philippines in 1898, and the Virgin Islands in 1917.

Power to
acquire
territory

The moment the title of the United States to any territory becomes established, the power of Congress to legislate for the territory's government begins. During time of war, the president, in his capacity as commander-in-chief, governs, through the army and navy, any territory acquired by conquest; but with the estab-

Power to
govern
territory

¹ As a sovereign state, the United States also has, under international law, the power to acquire territory by discovery and occupation, or by other methods recognized as proper by international usage. This is the basis of the title of the United States to the Guano Islands, acquired in 1856. See *U. S. Compiled Statutes* (1918), §§ 3916-3924; *Code of the Laws of the U. S.* (1926), p. 1644.

lishment of peace his authority as commander-in-chief ceases, and whatever power he may thereafter exercise must be based upon authority specifically granted by the constitution or by act of Congress. At different times, Congress has temporarily clothed the president with practically absolute power over a territory. But sooner or later it has established, in practically all regions acquired before the Civil War, governments similar to those created in the old Northwest and Southwest Territories; and ultimately all such territories have been admitted as states. The only departures from the rule were California and Texas, which were admitted as states without having passed through the territorial stage.

The admission of these two states and the organization of territorial government in those portions of the national domain not covered by the Northwest and Southwest ordinances, furnished the occasion, prior to 1860, for many exciting sectional controversies over slavery. At no time, however, was the absolute power of Congress to determine the form of territorial governments challenged; and the principle became firmly established that such governments exist merely as the instrumentalities by which Congress exercises its authority over the territories, and may therefore assume any form that Congress deems suitable: they may or may not be republican in form; they may or may not observe the principle of separation of powers; they may or may not grant to the inhabitants the rights of self-government. The real sectional conflict finally centered in the question whether the inhabitants of a territory have the same personal and property rights under the constitution that citizens enjoy in the states. More specifically, could Congress prevent the owners of slaves from enjoying their rights in that species of property in the territories, when admittedly it could not interfere with those rights in the states? Did the prohibition of slavery in the territories amount to a deprivation of property without due process of law, in violation of the Fifth Amendment? The issue thus raised was decided by the Supreme Court in the *Dred Scott* case in favor of the pro-slavery contention that the provisions of the bill of rights limit congressional action, not only when legislating for the inhabitants of the states, but also when legislating for the people of the territories. So far as slavery was concerned, the Civil War and the Thirteenth Amendment reversed this decision; but forty years or more thereafter, the Court upheld the same legal principle in deciding that the Sixth and Seventh amendments prevent both Congress and a

territorial legislature from changing the constitutional rule requiring trials by juries of twelve persons and unanimous verdicts.¹

With the exception of Alaska, all territories acquired by the United States before the Spanish-American War were contiguous and had been settled and developed by natives of this country and by European immigrants whose civilization and traditions were not fundamentally different from our own. Consequently, Congress felt little or no hesitation in extending to them a large measure of self-government and all of the civil rights secured by the national constitution. The Spanish-American War, however, brought under the control of the United States non-contiguous territory lying in the tropics and inhabited by relatively backward peoples of different race, almost totally inexperienced in self-government, and enjoying none of the civil and political rights which have long been the cherished heritage of our own citizens. Admittedly, the power to govern these new acquisitions resided in Congress; and at first glance it seemed that it would be necessary, in view of earlier Supreme Court decisions, to extend to their inhabitants all the rights and privileges enumerated in the constitution, including freedom of speech and of the press, the right to bear arms, and trial by jury. The embarrassing results which might follow this adherence to legislative and judicial precedents made it highly desirable, however, to draw some distinction between the legal status of these new possessions and that of the older territories on the continent, and in a series of decisions, beginning about 1900,² the Supreme Court found it possible to develop such a distinction, and thereby to release Congress from some of the restrictions under which it had previously dealt with territorial problems. The distinction which the Court evolved was that between territory "incorporated" in the United States and territory "not incorporated."³ In the former category were included Alaska, Oklahoma, New Mexico, and Arizona, none of which, at the time of these decisions, had been admitted to statehood. In legislating for the incorporated territories, said the Court, Congress was bound by all the limitations in the constitution which were not clearly inapplicable. Hawaii, Porto Rico, and the Philippines, on the other

CHAP.
XXX

New problems following the Spanish-American War

The insular decisions: "incorporated" and "unincorporated" territories

¹ *Springville City v. Thomas*, 166 U. S., 707 (1897); *Rasmussen v. U. S.*, 197 U. S., 516 (1905).

² J. W. Burgess, "The Decisions in the Insular Cases," *Polit. Sci. Quar.*, XVI, 486-504 (Sept., 1901).

³ F. R. Coudert, "The Evolution of the Doctrine of Territorial Incorporation," *Columbia Law Rev.*, XXVI, 823-850 (Nov., 1926); *Amer. Law Rev.*, LX, 801-864 (Nov.-Dec., 1926).

hand, were held to be "unincorporated" territories; they belonged to the United States rather than to any foreign power; they were appurtenant to, and dependencies of, the United States, but not a part thereof in the sense in which the incorporated territories were. Congress, therefore, in legislating with respect to them was not bound by all the limitations of the constitution applicable to the incorporated territories, but only by the "fundamental" parts of the constitution which automatically extend to all territories of the United States as soon as they cease to be foreign territory; the "formal" portions of the constitution, on the other hand, apply to unincorporated territories only when Congress expressly so directs.

The court has not attempted to make an exhaustive enumeration of the fundamental and formal parts of the constitution, but has reserved the right to determine from time to time what parts are fundamental and what parts are formal. In cases already decided, it has held that Congress is not bound by the requirement that taxes shall be uniform throughout the United States, but may impose taxes upon articles coming from the island dependencies which are different from those collected upon similar articles coming from a foreign country. Similarly, the Court has held that the requirement of grand and trial juries for the prosecution of criminals does not bind Congress in providing for the government of unincorporated territories like Hawaii (before 1900), Porto Rico, and the Philippines. Moreover, it has held that the mere act of annexation did not make the inhabitants of these islands citizens of the United States, but that American citizenship is to be derived from some express grant thereof by Congress. The result of all these decisions has been to give Congress a fairly free hand in working out the new problems arising out of our possession of tropical dependencies inhabited by politically inexperienced peoples. In point of fact—as will appear from the following description of the governmental arrangements which Congress has provided for our newer possessions—most of the rights guaranteed by the constitution have been generously extended to the people of such dependencies.

Alaska and Hawaii are at present our only "incorporated," or fully organized, territories. The inhabitants of Alaska are citizens of the United States; and in the organic act of 1912¹ the constitution and all laws of the United States not locally inapplicable

¹ *U. S. Compiled Statutes* (1918), pp. 545-557, (1923), pp. 206-216; *Code of the Laws of the U. S.* (1926), pp. 1557-1598.

are expressly declared to be in effect there, as elsewhere in the country. The present government is based on an act of 1884 establishing the first civil government, on later amendments to this act, and especially on the organic act of 1915 which gave the region a fully organized territorial government of the traditional type. There is a governor, and a surveyor-general acting *ex officio* as territorial secretary; and in each of four judicial divisions there is a district judge, a district attorney, and a marshal. All of these officers are appointed by the president and Senate for a four-year term, and are paid for their services out of the national treasury. In 1927, the departments of the Interior, Agriculture, and Commerce were authorized to designate one of their employees in Alaska to be *ex-officio* commissioner for Alaska and to have charge of all matters coming under the jurisdiction of his department, subject to the supervision and control of the respective heads of these departments in Washington.¹ The district court, now organized in four divisions, has the civil, criminal, equity, and admiralty jurisdiction of the district, and former circuit, courts of the United States.

CHAP.
XXXExecutive
and
judiciary

In 1912 Congress authorized the establishment of a territorial legislature consisting of a senate and a house of representatives. The senate is composed of eight members, two elected from each of the four judicial divisions; the house consists of sixteen members, four elected from each judicial division. The term of senators is four years; that of members of the house, two years. The first session of this legislature was held in 1913. The length of legislative sessions is limited to sixty days in any period of two years, although special sessions, not to last more than fifteen days, are also authorized. The power of the legislature extends to "all right-ful subjects of legislation not inconsistent with the constitution and laws of the United States," although a long list of limitations upon legislative action is included in the organic act. The governor may veto legislative measures, which are subject also to disallowance by Congress. A governor's veto can, however, be overcome by a two-thirds vote in each house. Since 1906 Alaska has been represented in Congress by an elected delegate, who, however, has no vote. The right to vote for territorial delegate and for members of the legislature has been granted to all citizens of the United States, twenty-one years of age, who are bona fide residents of Alaska, who have been resident continuously during the

Legislature

¹ 44 U. S. Statutes at Large, Pt. 2, pp. 1068-1069.

CHAP.
XXX

entire year immediately preceding an election, and who are able to read the constitution in the English language and to write English.¹

The gov-
ernment of
Hawaii

The people of the republic of Hawaii had long been seeking inclusion in the United States when Congress, in 1898, voted by joint resolution to annex the islands. Two years later the organic act was passed which now forms the basis of the government of the territory of Hawaii.² By this act all persons who were citizens of the Hawaiian republic on August 12, 1898, are declared to be citizens of the United States and of the territory of Hawaii; and all citizens of the United States who resided in Hawaii on that date, or who subsequently have resided in the territory for one year, are declared to be citizens of the territory. The constitution of the United States and, with a few exceptions, all United States laws not locally inapplicable have the same force and effect in the territory as elsewhere in the United States.

Citizenship

Executive

The present government of Hawaii follows very closely the traditional arrangements of organized territorial governments. Executive authority is vested in two sets of officers, one appointed by the president and Senate, and the other appointed by the governor of the territory and the Hawaiian senate. In the former class are the governor and the secretary, both of whom are appointed for a four-year term. The officers appointed and removable by the governor and territorial senate are an attorney-general, a treasurer, a commissioner of public lands, a commissioner of agriculture and forestry, a superintendent of public works, a superintendent of public instruction, an auditor and a deputy auditor, a surveyor, and a high sheriff.³ The tenure of all of these officials is four years, unless they are sooner removed by the governor and senate.

Legislature

The legislature comprises a senate and a house of representatives, both elected by direct popular vote. The senate consists of fifteen members chosen for four years from senatorial districts which are entitled to two, three, four, or six senators, respectively. Each voter, however, is permitted to vote for only one candidate.

¹ This literacy qualification was added by the territorial legislature in 1925 and by Congress in 1927: *Session Laws of Alaska, 1925*, Chap. 27, pp. 51-54; 44 *U. S. Statutes at Large*, Pt. 2, pp. 1392-1394.

² *U. S. Compiled Statutes* (1918), pp. 545-557, (1923), pp. 206-216; *Code of the Laws of the U. S.* (1926), pp. 1599-1614, 2117-2118. Between the date of annexation (1898) and the enactment of the organic law of 1900 Hawaii was an unincorporated territory. See *Hawaii v. Mankiehi*, 190 U. S., 197 (1902).

³ Members of numerous boards and commissions are similarly appointed.

The house of representatives has thirty members, elected every two years, from six representative districts, each of which is entitled to either four or six members. Voters are permitted to vote for the full quota from their district. Legislative sessions are held biennially, and are limited to sixty days, although the governor may extend a session thirty days. The power of the legislature extends to "all rightful subjects of legislation not inconsistent with the constitution and laws of the United States locally applicable;" at the same time there is, as in Alaska, a long series of specific limitations. The governor may veto legislative acts; but a veto may be overridden by a two-thirds vote of each house.

CHAP.
XXX

Judicial power within the territory is exercised by two sets of courts, territorial and federal. The territorial courts correspond rather closely to our state courts and comprise a supreme court, circuit courts, and such inferior courts as the legislature may create from time to time. The supreme court consists of a chief justice and two associate justices, all of whom must be citizens of Hawaii. They, and the judges of the circuit court also, are appointed by the president and the Senate for a four-year term, unless sooner removed by the president. Besides these territorial courts, there is a federal district court consisting of two judges, a district attorney, and a marshal, all of whom are appointed by the president and Senate for a six-year term, unless sooner removed by the president.

Judiciary

A territorial delegate to Congress, without a vote, is also elected by the people every two years. To be qualified to vote for territorial delegate and for members of the legislature, a person must be a citizen of the United States, twenty-one years of age, a resident of the territory for at least a year prior to the election, duly registered as a voter, and able to speak, read, and write the English or the Hawaiian language. The effect of these restrictions is to exclude the Chinese and Japanese, who constitute almost a majority of the population of the islands.

Suffrage

Porto Rico and the Philippine Islands are our most important unincorporated, or partially organized, territories. The government of Porto Rico is based on organic acts passed by Congress in 1900 and 1917.¹ The second measure extended United States citizenship for the first time to the residents of the island. Hitherto, they had been neither citizens of the United States nor citizens of

The gov-
ernment of
Porto RicoCitizenship
and rights

¹ *U. S. Compiled Statutes* (1918), pp. 557-575; *ibid.* (1923), pp. 216-217; *Code of the Laws of the U. S.* (1926), pp. 1614-1625.

a foreign country, but merely citizens of Porto Rico.¹ The act of 1917 also included an elaborate bill of rights covering almost all of the points in the first eight amendments to the national constitution, with the omission of trial by jury and indictment by grand jury.² Most statutory laws of the United States not locally inapplicable have the same force and effect in Porto Rico as in the United States proper.

Executive

The "supreme executive power" is vested in the governor, who is appointed by the president and Senate, and who holds office during the pleasure of the president. Six executive departments were created in 1917, namely, a department of justice, with the attorney-general at its head; a department of finance, with the treasurer at its head; and a department of interior, a department of education, a department of agriculture and labor, and a department of health, each with a commissioner at its head. The attorney-general and the commissioner of education are appointed by the president and Senate for four years, unless sooner removed by the president. The heads of the other departments are appointed by the governor and senate of Porto Rico, for a term of four years, unless sooner removed by the governor. These heads of departments collectively form an executive council.³ The principal financial officer is an auditor appointed by the president for a term of four years, and enjoying very extensive powers. He is, however, under the general supervision of the governor. Corresponding to the territorial secretary in Alaska and Hawaii is an executive secretary, appointed by the governor and senate of Porto Rico.

Legislature

The Porto Rican legislature also is much like the Hawaiian. The senate consists of nineteen members elected by popular vote for a four-year term; each of seven districts elects two senators, and five others are elected at large. To this body the organic law of 1917 transferred all the purely legislative powers and functions theretofore exercised by the executive council, and also the confirmation of appointments. The house of representatives consists of thirty-nine members elected every four years, thirty-five of them chosen from single-member districts and four elected at large. In electing the senators and representatives who are chosen at large,

¹ A. Shaw, "Porto Ricans as Citizens," *Rev. of Revs.*, LXIII, 483-491 (May, 1921); S. Baxter, "Porto Ricans under the Stars and Stripes," *ibid.*, LXVII, 497-506 (May, 1923).

² *Balzac v. Porto Rico*, 258 U. S., 298 (1922).

³ Until 1917, the executive council, somewhat differently constituted, formed the upper branch of the territorial legislature.

each voter is permitted to vote for only one candidate for the senate and house respectively. Legislative sessions are held biennially, and special sessions of the senate, or of both houses, may be called by the governor.

CHAP.
XXX

General legislative powers were conferred on the Porto Rican legislature in 1917 in substantially the same language as in the organic laws of Alaska and Hawaii. But, in the case of Porto Rico, legislative organization and procedure are regulated in much greater detail than in either of the other territories mentioned. The legislature is denied the right to create new executive departments, but is given authority to consolidate or abolish departments with the consent of the president. Franchises, instead of being conferred by the legislature, are granted by a public service commission consisting of three commissioners appointed by the governor and Porto Rican senate for three-year terms.¹ Franchises granted by this commission do not, however, become effective until approved by the governor; and they are further subject to annulment or modification by Congress. The legislature also has the right to enact laws regulating the rates, tariffs, and services of railroads in Porto Rico, and the enforcement of these regulations is placed in the hands of the public service commission. The possibility of a deadlock between the two houses over appropriations for the support of the government has been provided for since 1909 in much the same manner as in the organic act of 1900 for Hawaii. If, by the end of the fiscal year, the territorial legislature has failed to make the necessary appropriations for the ensuing fiscal period, the sums specified in the last appropriation bills are deemed to have been reappropriated. The provision relating to the veto power of the governor is unusual, in that it permits an appeal to the president. A bill vetoed by the governor may be repassed by a two-thirds vote of each house, and in case the governor still refuses to approve the measure, it is transmitted to the president, who is given ninety days in which to signify his approval or disapproval; inaction on his part is tantamount to approval. All laws passed by the legislature of Porto Rico have to be submitted to the president, and are subject to annulment by Congress.

Public
service
commis-
sion

Budget

Veto

A resident commissioner, corresponding to the territorial dele-

¹ 44 *Statutes at Large*, Pt. 2, pp. 1418-1421. From 1917 to 1927 the commission consisted of the heads of the executive departments and two commissioners elected by popular vote every four years.

CHAP.
XXX
Suffrage

gates from Alaska and Hawaii, is elected by popular vote every four years to represent the Porto Ricans in Congress, without a vote. Voting qualifications are, for the most part, left by the organic acts to be prescribed by the local legislature, subject to the provision that "no property qualification shall ever be imposed upon or required of any voter." Since 1906, citizens of Porto Rico who have resided in the island one year, and are twenty-one years of age, have been voters, provided they could prove their ability to read and write.

Judiciary

The judicial system of the island is regulated in part by the organic laws of 1900 and 1917, and in part by a series of laws passed by the local legislature in 1904. As in Hawaii, there are two kinds of courts, territorial and federal. At the head of the former stands the supreme court, composed of five justices appointed by the president and Senate for life or good behavior. Below this court are seven district courts, each presided over by one judge appointed by the governor and senate for a term of four years. Provision is also made for a substitute judge to serve whenever any regular judge is incapacitated. Finally, there are thirty-four "municipal" courts, in as many judicial districts, with limited jurisdiction in civil and criminal cases. In each of these municipal courts there is a single judge who, together with a marshal and a clerk, is elected by popular vote every two years. There are also fifty-one justices of the peace, appointed by the governor and senate. Besides these territorial courts, there is a federal district court with one judge and a district attorney and marshal, all of whom are appointed by the president and Senate for four years, unless sooner removed.¹

Govern-
ment of
the Philip-
pines

For nearly three years after the Philippine Islands were ceded by Spain to the United States, they were governed under the direction of the president as commander-in-chief of the army and navy. Despite the military character of this régime, preparations steadily went on from the beginning of American rule for the establishment of a stable civil government. The first step was the appointment by the president, in 1899, of a commission, sometimes called

1. Military
govern-
ment

¹For further information upon Porto Rican politics and administration, see R. H. Post, "What Is Wrong in Porto Rico?" *World's Work*, XLIII, 261-267 (Jan., 1922); H. P. Krippene, "Porto Rico's Playful Politics," *Curr. Hist.*, XV, 610-615 (Jan., 1922); A. R. Barcelo, "American Rule in Porto Rico, 1899-1924," *ibid.*, XXI, 511-517 (Jan., 1925); S. M. Lindsay, "Porto Rico Revisited," *Rev. of Revs.*, LXXIII, 511-514 (May, 1926); letter of President Coolidge to Governor Towner, *U. S. Daily*, Mar. 16, 1928, pp. 111 ff.

the First Philippine Commission,¹ to investigate conditions in the islands and report facts and recommendations as a basis for further action by the president and Congress. This commission, it should be observed, was not in any sense a governing body, and in that respect it is to be sharply distinguished from the Second Philippine Commission created the following year. The next step was the severance, in March, 1900, of the executive and legislative functions which were then being performed by the military authorities; legislative functions were now assigned to a new commission, the Second Philippine Commission just mentioned, while executive functions continued to be performed, as hitherto, by the military authorities. In addition to its legislative functions, the new civil commission was authorized to provide for the establishment of judicial tribunals and to make all necessary appointments for the proper administration of the civil, judicial, and educational affairs of the government. The point should be stressed that, although this was a civilian commission in its personnel, it was, in legal character, merely a part of the purely military government which was directly responsible to the president and wholly controlled by his instructions. The commission entered upon the performance of its duties in September, 1900.

CHAP.
XXX

The third step in working toward a civil basis was taken in March, 1901, when Congress authorized the president to establish a temporary civil government. Under this authority, and no longer acting in his capacity as commander-in-chief, the president appointed the head of the second commission, William H. Taft, to be civil governor; and upon Mr. Taft's inauguration, July 4, 1901, all the executive functions hitherto performed by the military authorities in the pacified provinces² were transferred to the governor and the commission. With this event, the commission lost its quasi-military character, and became in law, as well as in fact, a civil governmental body. As yet, however, the form of the civil government rested solely upon the discretion of the president, to whom authority had been granted to change the form of government at any time. At first the civil commission had consisted solely of Americans; but in September, 1901, the president added three Filipino members and created four executive departments to be

2. Civil
govern-
ment

¹ The chairman of this commission was Jacob Gould Schurman, then president of Cornell University.

² The complete pacification of the islands dates from July 4, 1902, when the office of military governor in the hitherto rebellious provinces was abolished and these provinces were placed under the jurisdiction of the governor and commission.

CHAP.
XXXOrganic
law of
1902

presided over by the four American members.¹ Shortly thereafter the office of vice-governor was created.

While this temporary civil government was in operation, Congress was considering plans for a more permanent government under which the residents of the islands should have some share in governing themselves. The result was the enactment, in July, 1902, of the first organic law for the islands—a measure which, with only slight alterations, continued the government then in existence. The act also expressly declared that the constitution and laws of the United States did not extend to the islands; although it contained a declaration of rights which provided for practically all of the rights guaranteed to citizens of the United States under the constitution, except those of bearing arms and trial by jury. Provision was made also for a representative legislative assembly, to be chosen by popular vote at as early a date as conditions warranted. In 1907 the first Philippine assembly convened and assumed its functions as the lower branch of a legislature whose upper branch consisted of the commission. Thus constituted, the legislature continued to enact laws of local application, subject to the veto of the governor and the disapproval of Congress, until the passage of the Philippine Government Act of 1916, under which the present government of the islands is organized and conducted.²

Organic
law of
1916

Executive

The act of 1916, commonly known as the Jones Act, made three important changes: first, it materially enlarged the insular government's powers; second, it strengthened the hand of the executive branch; third, it replaced the commission as a legislative body with a senate elected by the people. The "supreme executive" power is vested in the governor-general, appointed by the president and Senate, and holding office during the pleasure of the president. He has large powers of appointment, subject to the approval of the Philippine senate, and likewise general supervisory control over all departments and bureaus. He also submits the budget, which is the basis of the annual appropriation bills; and, unlike the governor of Porto Rico, he has exclusive power to grant pardons and reprieves, and to remit fines and forfeitures. In general, he has rather broader powers than have been granted to the governors of our other dependencies. There is also a vice-governor, appointed in the same manner, who, in addition to serving in the governor-

¹ When the commission form of government was superseded in 1917 there were nine members of the commission, of whom five were Filipinos.

² *U. S. Compiled Statutes* (1918), pp. 575-593; *ibid.* (1923), p. 217; *Code of the Laws of the U. S.* (1926), pp. 1625-1637.

general's absence or incapacity, acts as head of the department of public instruction, which includes a bureau of public health as well as a bureau of education. The supervising and controlling financial officers are an auditor and a deputy auditor, appointed by the president, with powers similar to those of the auditor of Porto Rico. The five executive departments already in existence were continued by the act of 1916, but the legislature was granted authority to increase the number or to change the names and duties of the departments, with the important qualification that "all executive functions of the government must be directly under the governor-general, or within one of the executive departments under the supervision and control of the governor-general." At the present time (1928) there are six departments, namely, interior, public instruction, finance, justice, agriculture and natural resources, commerce and communication; and each, with the exception of the department of public instruction, is presided over by a Filipino secretary, appointed by the governor-general and Philippine senate.

CHAP.
XXX

General law-making powers are vested in a legislature consisting of two houses, elected by popular vote, save that two senators and nine representatives are appointed by the governor-general to represent the non-Christian districts. Of the twenty-four senators, twenty-two are elected in eleven districts, each district choosing two for a six-year term; and one-half of the total number are elected every three years. Of the ninety representatives, eighty-one are chosen from single-member districts for a three-year term. The organization and procedure of the legislature are fully covered in the organic law, and provision is made, as in Hawaii and Porto Rico, that if the two houses fall into a deadlock on the budget, the appropriations previously made shall be regarded as continuing in force. The governor-general's veto on legislation, with subsequent appeal to the president, is the same as in Porto Rico, except that the president has six months instead of three in which to signify his approval or disapproval.¹ All acts of the legislature have to be transmitted to Congress, and that body has a right (seldom exercised) to annul any of them.

Legislature

As a connecting link between the executive and legislative

¹ The first measure to receive a presidential veto was the bill providing for a popular referendum upon the question of Philippine independence (April 6, 1927). The veto message of President Coolidge sets forth at length the reasons which justify the denial of immediate independence. See *N. Y. Times*, April 7, 1927; *U. S. Daily*, Apr. 8, 1927, p. 380.

CHAP.
XXXCouncil
of state

branches, quite unprovided for in the Jones Act, a council of state was created by executive order in 1918, consisting of the governor-general, the heads of the six departments, and—of especial significance—the speaker of the house and the president of the senate. The council was ostensibly created to “advise the governor-general on public matters,” but subsequently many additional powers were conferred on it by the Philippine legislature. The inclusion of the presiding officers of the two branches of the legislature brought to the council board, openly and officially, the two men who actually controlled the government. A means was thus provided for “the expression of the will of the Filipino people regarding their government through officials who in their capacity as councillors were responsible only to the legislature.”¹

Resident
commis-
sioners

Suffrage

Two resident commissioners are elected by popular vote every three years to represent the islands in Congress. They are entitled to speak, but not to vote. The suffrage for the election of these and all other officers has been extended to male persons (except the insane, the feeble-minded, and criminals) twenty-one years of age, who are not citizens or subjects of any foreign country, and who have resided in the Philippines for a year, provided they belong to one of the following classes: (1) persons who, under existing laws, were legal voters in 1916 and had exercised the right of suffrage; (2) persons who own real property valued at five hundred pesos, or who pay the established taxes amounting to fifty pesos annually; and (3) persons who are able to read and write Spanish, English, or a native language.

Judiciary

The judicial system differs from that in Hawaii and Porto Rico in at least one important respect: no provision has been made for any federal court. Cases which would ordinarily come before a federal district court are placed in the jurisdiction of the Philippine courts of first instance. At the head of the judicial system is a supreme court, consisting of a chief justice and eight associate justices, appointed by the president and Senate to serve during good behavior.² The chief justice and three of the associate justices are Filipinos; the other five justices are Americans. Below the supreme

¹ M. M. Kalaw, “The New Philippine Government,” *Amer. Polit. Sci. Rev.*, XIII, 415-428 (Aug., 1919); R. Hayden, “The United States and the Philippines, A Survey of Some Political Aspects of Twenty-five Years of American Sovereignty,” *Annals Amer. Acad. of Pol. and Soc. Sci.*, CXXII, 26-48 (Nov., 1925); *ibid.*, “The Philippines: An Experiment in Democracy,” *Atlantic Monthly*, CXXXVII, 403-417 (Mar., 1926).

² From the Philippine Supreme Court cases may be appealed directly to the United States Supreme Court.

court are the courts of first instance, consisting of one judge in each of twenty-six judicial districts (except in that of Manila, in which there are four judges), all appointed by the governor-general and Philippine senate. These judges (all of whom, with but two exceptions, are Filipinos) serve during good behavior or until they reach the age of sixty-five, when they are retired. The courts in which they sit correspond to the district, circuit, or county courts of the states, with jurisdiction enlarged to include admiralty, customs, patent, and bankruptcy cases which in the United States proper are ordinarily handled by the federal district courts. Seven auxiliary judges are also appointed by the governor and senate to serve in these courts of first instance as assistants or as substitutes. Below these higher courts there is a justice of the peace in every municipality and a magistrate in every organized town, all of whom are Filipinos. So completely has the United States given over the government of the islands to the Filipinos that the supreme court is today (1928) the only branch of the insular government in which Americans form a majority; the latter constitute only about three per cent of the total number of government officials, including school teachers, while in the central government itself they comprise less than two per cent.

From the foregoing outline of the governmental provisions of the Jones Act, it is reasonably clear that the act was intended to provide for the Philippines a thoroughly American scheme of government—one based upon the doctrine of separation of executive, legislative, and judicial powers; there is no indication of an intention to set up a parliamentary system of government. Nevertheless, with the coöperation of Governor-General Harrison ¹ and the approbation of President Wilson, the principle of separation of powers was soon discarded and the governor-general stripped, by successive legislative acts, of many of his powers and reduced to the position of a figurehead or the titular chief of a parliamentary state. And the theory was advanced and tacitly accepted that the heads of executive departments were responsible to the legislature and not to the governor-general. The creation of the council of state, and particularly bringing into it the two party leaders in the legislature, completed the establishment of what was, to all intents and purposes, a parliamentary government. The two last-named mem-

CHAP.
XXX

Actual
government
under the
Jones Act

¹ For conditions under Governor-General Harrison, immediately preceding the adoption of the Jones Act, see T. L. Blayney, "Our Administration of the Philippines," *Rev. of Revs.*, LIII, 83-90 (Jan., 1916).

bers of the council, through their absolute mastery of the legislature, became also the real head of the executive branch of the Philippine government—a result not intended or contemplated in the Jones Act, and one which in effect gave to the Filipinos practically complete autonomy, likewise unauthorized and unintended by Congress in 1916. This was the situation at the time of the appointment of Governor-General Wood in 1921; and much of the friction which marked his administration was due to opposition to his efforts to substitute the sort of government provided for in the Jones Act for this parliamentary system, a policy which involved some curtailment of the considerable autonomy which the Filipinos had been enjoying for several years.¹

The ques-
tion of in-
dependence

Although the Jones Act did not grant complete self-government, it did declare the intention of the United States to withdraw sovereignty from the Philippines and to recognize the independence of the islands "as soon as a stable government can be established therein." This measure was the work of a Democratic Congress, and the party's national platform of the same year endorsed the principle of "ultimate independence." The Republican platform denounced the Democratic attitude and declared that the American task in the islands was but half done. The position of the parties in 1920 differed similarly, and the question continues to call out widely varying expressions of opinion. A Democratic governor-general, on retiring from office in 1921 after seven years of service, reported to the president that the Filipino people had established the specified stable government and were therefore entitled to independence; and the same opinion was expressed in the Democratic platform of 1924, which declared that "it is our liberty and our duty to keep our promise to these people by granting them the independence which they so honorably covet."² On the other hand, a special mission sent to the islands in 1921 by a Republican president reported with equal tone of assurance that the inhabitants

¹R. Hayden, "The Philippines: An Experiment in Democracy," *Atlantic Monthly*, CXXXVII, 403-417 (Mar., 1926). See also President Coolidge's letter of February 21, 1924, to Speaker Roxas, replying to the formal charges filed against Governor-General Wood by the Philippine legislature, "President Coolidge's Statement on Filipino Independence," *Curr. Hist.*, XX, 158-160 (Apr., 1924), reprinted in J. K. Pollock's *Readings in American Government*, 309-311; W. Wilgus, "Cleaning-up the Philippines: Leonard Wood and His Six Years' Work," *Rev. of Revs.*, LXXXVI, 147-153 (Aug., 1927).

²For signs of change in the attitude of Democratic leaders, see V. Villamin, "Hold the Philippines: Signs of Revolution in Democratic Ranks," *Rev. of Revs.*, LXXXVI, 154-158 (Aug., 1927).

were not yet prepared for full self-government;¹ and to this view the Republicans subscribed in their platform of 1924. The Filipinos themselves are divided. A large, and probably increasing, element asks for independence at once, with perhaps a certain international guardianship in the United States; other groups feel that the act of 1916 meets all reasonable present needs and that more experience should be gained before the islands become the full masters of their own affairs.²

The period of Governor-General Wood's administration (1921-27) was one of almost constant friction and deadlock between the executive and the Philippine legislature, and of increasingly insistent demands on the part of Filipino leaders for "immediate, absolute, and complete independence." With a view to obtaining a clearer and fresher view of the actual situation in the islands, President Coolidge, in the summer of 1926, sent Colonel Carmi A. Thompson, of Ohio, to the Philippines, charged with making an exhaustive investigation of general conditions there, both political and economic. Colonel Thompson's report (submitted in the following December), although opposing any action that would close the door to *ultimate* independence, declared the granting of independence to the islands, now or for some time to come, to be impossible: (1) because the people of the islands lack the financial resources necessary to maintain an independent government; (2) because they do not have the homogeneity and solidarity essential to separate national existence, owing in part to the lack of a common language, in part to the wide gulf existing between the upper and lower classes—a gulf such as is unknown in America and so wide as to make genuine popular government impossible at present,—and, in part, to the bitter religious and other differences between the Mohammedan Moros and some of the pagan tribes, on the one hand, and the Christian Filipinos, on the other. (3) Granting independence at this time, the report goes on to say, would also be unwise from the standpoint of American commercial interests in the Orient, and might seriously complicate our inter-

CHAP.
XXX

The
Thompson
report, 1926

¹ The report of the commission appointed in 1921 (General Leonard Wood and former governor-general W. C. Forbes) is printed in *Curr. Hist.*, XV, 678-694 (Jan., 1922).

² The cause of independence is ably argued in M. M. Kalaw, *The Case for the Filipinos* (New York, 1916), and *Self-Government in the Philippines* (New York, 1919); and M. L. Quezon, "The Case for Immediate Philippine Independence," *Curr. Hist.*, XX, 936-942 (Sept., 1924). A similar argument, by a former American governor-general, is F. B. Harrison, *The Corner-Stone of Philippine Independence: a Narrative of Seven Years* (New York, 1922).

national relations in that quarter. (4) Lastly, the granting of independence would end the free-trade relationship between the United States and the Philippines and bring about economic disaster for the islands.¹

Although opposing immediate independence on the grounds stated, the Thompson report viewed with disfavor any further increase in the powers of the governor-general, as had been urged by American residents in the islands, and any other changes in the Jones Act at present, although amendments may be desirable in the near future whereby Filipino autonomy shall be gradually extended until the time comes for complete self-determination. The administration of the Philippine Islands and other overseas territory, it was urged, should be transferred from the War Department to some civil branch of the government, inasmuch as no reasons exist at present for continuing the islands under military or naval jurisdiction. At the same time the governor-general should be provided with civilian advisers in order to relieve him of the present necessity of selecting his official advisers from the United States army—a situation which has been responsible for much of the lack of co-operation between the legislative and executive branches of the Philippine government.²

The government of the remaining possessions of the United

¹ Compare with President Coolidge's message vetoing the Philippine plebiscite on independence, *N. Y. Times*, Apr. 7, 1927; *U. S. Daily*, Apr. 8, 1927, p. 380.

² 69th Cong., 2nd Sess., Sen. Doc. No. 180 (1926), "Conditions in the Philippine Islands." This report may more conveniently be found in *Curr. Hist.*, XXV, 722-726 (Feb., 1927). See also the author's article, "Cocoanut Politics in the Philippines," *World's Work*, LIV, 27-35 (May, 1927); H. L. Stimson, "First-Hand Impressions of the Philippine Problem," *Saturday Eve. Post*, CXIX, 6-7 (Mar. 19, 1927); *ibid.*, "Future Philippine Policy Under the Jones Act," *Foreign Affairs*, V, 459-471 (Apr., 1927). The author of these two articles was appointed governor-general in December, 1927, to succeed the late Governor-General Wood.

Other recommended articles on the Philippine problem are: C. W. Farwell, "Philippine Progress under American Rule," *Curr. Hist.*, XIX, 275-280 (Nov., 1923); O. G. Jones, "Teaching Citizenship to the Filipinos by Local Self-Government," *Amer. Polit. Sci. Rev.*, XVIII, 285-296 (May, 1924); R. L. Buell, "What about the Philippines?" *Atlantic Monthly*, CXXXIII, 394-403 (Mar., 1924); *Congressional Digest*, III, 226-239 (Apr., 1924), series of articles on Philippine independence; N. Lyons, "Filipino Leaders Split on Independence Issue," *Curr. Hist.*, XXI, 866-872 (Mar., 1925); *ibid.*, "What Next in the Philippines?" *No. Amer. Rev.*, CCXXIV, 365-373 (Sept., 1927); D. R. Williams, "The Philippine Islands," *Rev. of Revs.*, LXXIV, 177-183 (Aug., 1926); S. P. Duggan, "The Future of the Philippines," *Foreign Affairs*, V, 114-131 (Oct., 1926); *Annals Amer. Acad. Polit. and Soc. Sci.*, CXXXI, Suppl., 1-33 (May, 1927), "Are the Filipinos Ready for Independence?" (a symposium); M. Storey, "The Philippines: An American Ireland," *Foreign Affairs*, V, 579-588 (July, 1927).

States must be described very briefly. The Virgin Islands, acquired by purchase from Denmark in 1917, are under the immediate control of the president, in accordance with authority conferred by Congress. The act of March 3, 1917, provided for the temporary government of the islands by placing all civil, military, and judicial powers necessary to their government in the hands of a governor, appointed by the president and Senate, aided by such other persons as the president may appoint, and wielding authority in such manner as he may direct until further action by Congress.¹ So far as is practicable, the electoral and other local laws enacted under Danish rule remain in force. American citizenship was conferred upon the inhabitants by act of Congress in 1927.²

CHAP.
XXX
Government of
minor de-
pendencies

1. Virgin
Islands

The Panama Canal Zone comprises a strip of territory five miles wide on each side of the canal, acquired from the Republic of Panama in 1902. During the construction of the canal, the Zone was governed by the president, acting through a commission whose appointment had been authorized by Congress. As the work of construction neared completion, Congress, in 1913, authorized the president to discontinue the commission and to govern the Canal Zone through a governor and such other officials as might be necessary.³ There is now a "governor of the Canal," appointed by the president and Senate for four years. Provision has been made by law for the establishment of organized towns in the Zone, and for a system of courts beginning with the magistrates' courts corresponding to justices of the peace elsewhere. Above these there is one district court sitting in two divisions, which has original jurisdiction in all felony, and in more important civil, cases, and in equity; it also has the admiralty jurisdiction of a federal district court. The judge of this court, a district attorney, and a marshal, are appointed by the president for a term of four years each.

2. Panama
Canal Zone

Samoa and Guam have never been given any form of govern-

¹ *Code of the Laws of the U. S.* (1926), pp. 1643-1644.

² 44 *U. S. Statutes at Large*, Pt. 2, pp. 1234-1235; "A Forward Step," *Nation*, CXXIV, 334 (Mar. 30, 1927). See also L. Rogers, "Government of the Virgin Islands," *Amer. Polit. Sci. Rev.*, XI, 736-737 (Nov., 1917); G. W. Williams, "The Virgin Islands Under American Rule," *Curr. Hist.*, XIX, 827-828 (Feb., 1924); V. Bari, "What To Do With the Virgin Islands?" *No. Amer. Rev.*, CCXXII, 266-273 (Dec., 1925-Feb., 1926); D. D. Hoover, "The Virgin Islands under American Rule," *Foreign Affairs*, IV, 503-506 (Apr., 1926); T. H. Dickinson, "The Economic Crisis in the Virgin Islands," *Curr. Hist.*, XXVII, 378-381 (Dec., 1927).

³ *U. S. Compiled Statutes* (1918), pp. 1651-1657; *Code of the Laws of the U. S.* (1926), pp. 1637-1643; G. W. Goethals, *Government of the Canal Zone*, (Princeton, 1915); D. H. Smith, *The Panama Canal: Its History, Activities, and Organization* (Baltimore, 1927).

CHAP.
XXX

3. Samoa
and Guam

ment by Congress. They are governed by the president, acting through the Navy Department, which has designated naval officers to be governors of the islands. The officials organize the administration, levy taxes, make such laws as are required, and in general exercise complete authority over the inhabitants. In our smallest insular possessions, the Midway, Howland, Baker's, and Guano islands, neither civil nor military government has yet been provided.¹

District of
Columbia

As the seat of the national government, the District of Columbia, comprising some seventy square miles on the north bank of the Potomac and including the city of Washington, is completely under the control of Congress. There is no local legislature; Congress itself makes all laws, whether pertaining to administrative and judicial organization or to financial, educational, and similar affairs of the area. No governor or mayor or other single chief executive presides; for since 1878 executive authority has been vested in a commission of three persons, of whom two are appointed by the president and Senate from among the residents of the District for a three-year term, and a third is detailed by the president from the engineer corps of the army for an indefinite term. As a body, these three commissioners have extensive powers; they appoint to numerous important municipal positions; they have charge of police and fire protection, and make regulations for the protection of life, health and property; they supervise the local public utilities, including gas, electricity, telephones, transportation, and water-supply. Schools are under a board of education appointed by the judges of the supreme court of the District; a board of charities and the judges of a municipal court are appointed by the president. Sixty per cent of the cost of the District government is paid from taxes levied upon the inhabitants by Congress; the remaining forty per cent is met out of the national treasury.

Many of the half-million residents of the District retain a legal residence in some one of the states and may vote there, usually by mail. In the District itself, however, none—even though taxpayers—are voters; there are no locally elected officers, and the District as such has no part in choosing the president or members of Con-

¹ Unlike most other nations having extensive dependencies, the United States has not entrusted colonial supervision to a single executive department. Instead, the War Department, and especially the bureau of insular affairs therein, maintains general supervision over Porto Rico, the Philippines, and the Canal Zone; the minor island dependencies are under the supervision of the Navy Department; and certain phases of administration in Alaska and Hawaii have been assigned to the Department of the Interior.

gress. Notwithstanding this denial of direct participation in their own government, however, "there is probably no municipal government in this country where the opinion of the individual citizen has more influence on local government." The commissioners and the committees of Congress to which bills relating to District matters are referred hold hearings on every measure of local importance, and any person who desires to express an opinion is certain of consideration; and in 1926 the House committee on the District of Columbia invited a wider expression of popular views by adopting the practice of sending bills to a citizens' advisory council representing numerous civic organizations in the District.¹

CHAP.
XXX

Several small Caribbean and Central American states have come so largely under the influence of the United States within the past decade or two that they can no longer be regarded as fully sovereign, but rather must be considered protectorates. At one time or another since the close of the Spanish-American War, armed intervention by American forces has taken place in Cuba, Haiti, Santo Domingo, Nicaragua,² and Honduras, sometimes for the pur-

Protec-
torates

¹ *American Year Book* (1926), 227; A. C. McLaughlin and A. B. Hart, *Cyclo. of Amer. Govt.*, I, 603. See also G. W. Hodgkin, "The Constitutional Status of the District of Columbia," *Polit. Sci. Quar.*, XXV, 257-270 (June, 1910); W. F. Dodd, *The Government of the District of Columbia* (Washington, 1909); O. Wilson, "Disfranchised Washington," *Nat. Mun. Rev.*, IX, 489-492 (Aug., 1920); D. E. Garges, "How Washington is Governed," *Nat. Mun. Rev.*, XII, 577-580 (Oct., 1923); H. James, "Our Federal City—A National Symbol," *Rev. of Revs.*, LXX, 177-190 (Aug., 1924); J. S. Gallagher, *The Government of Washington* (New York, 1923); F. Telford, "Unhappy Revelations in the District of Columbia's Government," *Nat. Mun. Rev.*, XV, 579-582 (Oct., 1926); *Congressional Digest*, VI, 327-355 (Dec., 1927), a series of articles on "The Capital of the United States—Past, Present, Future."

² The differing views on American intervention in Nicaragua are reflected in the following references: A. Woods, "The Truth About Nicaragua," *Searchlight on Congress*, XI, 12-15 (May, 1926); W. S. Penfield, "Emiliano Chamorro, Nicaragua's Dictator," *Curr. Hist.*, XXIV, 345-350 (June, 1926); C. Beals, "The Nicaraguan Farce," *Nation*, CXXIII, 631-632 (Dec. 15, 1926); F. P. Fernandez, "The Case of Nicaragua," *Living Age*, CCCXXXII, 36-38 (Jan. 1, 1927); C. W. Hackett, "Rival Governments in Nicaragua," *Curr. Hist.*, XXV, 734-736 (Feb., 1927); "The United States Intervention in Nicaragua," *ibid.*, XXVI, 104-107 (Apr., 1927); "Nicaraguan Civil Strife Ended by United States Ultimatum," *ibid.*, XXVI, 634-638 (July, 1927); C. Binder, "On the Nicaraguan Front," *New Republic*, L, 87-90 (Mar. 16, 1927); P. F. Martin, "The United States and Nicaragua," *Fortnightly*, CXXVII, 476-480 (Apr., 1927); *Congressional Digest*, VI, 111-137 (Apr., 1927), "The United States and Nicaragua" (series of articles); *New Republic*, L, 314-315 (May 11, 1927), "Order in Nicaragua vs. Self-Government"; L. Wells, "Our Coming Intervention in Nicaragua," *New Republic*, L, 322-324 (May 11, 1927); *Annals Amer. Acad. Polit. and Soc. Sci.*, CXXXII, 115-163 (July, 1927), "The United States and Central America," (series of articles); *Curr. Hist.*, XXVI, 833-924 (Sept., 1927) series of articles on

pose of assuming control of a disordered financial administration, in the interest of foreign bond-holders; at other times, for the protection of life and property generally and the orderly conduct of elections, when a local insurrection was in progress or threatened. The right of the United States thus to intervene in the domestic affairs of these Lilliputian states has been derived in some instances, as in Cuba, Haiti, and Santo Domingo, from formal treaty stipulations. At other times—although perhaps broadly justifiable under the Monroe Doctrine, and also because of connection with our general foreign policy—it has rested upon far less substantial foundations. As a rule, these interventions have been for only brief intervals, our armed forces being withdrawn as soon as order could be restored and a stable government set up—stable, at least, until the next revolution broke out. But we once kept the entire administration of Cuba in our hands for two and a half years (1906-09).¹ Naturally, the natives have not universally welcomed such incursions. Considerable elements have protested vigorously, often carrying their grievances to Washington; and at times, notably in the case of Haiti and Santo Domingo, they have been able to induce Congress to undertake an extended investigation of the circumstances surrounding the despatching of military and naval forces and the conduct of these forces during their stay.²

"United States Policy Toward Latin America"; H. L. Stimson, *American Policy in Nicaragua* (N. Y., 1927); *ibid.*, "American Policy in Nicaragua," *Sat. Eve. Post*, CC, 8-9 (Oct. 1, 1927), 20-21 (Oct. 8, 1927), 18-19 (Oct. 15, 1927); J. M. Moncada, "Nicaragua and American Intervention," *Outlook*, CXLVII, 460-462 (Dec. 14, 1927); I. J. Cox, "Nicaragua and the United States, 1909-1927," *World Peace Foundation Pamphlets*, X, No. 7 (1927).

¹See R. R. Altunaga, "Cuba's Case for the Repeal of the Platt Amendment," *Curr. Hist.*, XXVI, 925-927 (Sept., 1927); C. E. Chapman, *A History of the Cuban Republic* (New York, 1927); G. Ireland, Amendment vs. Revolution: Changing Cuba's Constitution," *Amer. Bar Assoc. Jour.*, XIII, 617-621 (Nov., 1927); O., "Cuba and the United States," *Foreign Affairs*, VI, 231-244 (Jan., 1928).

²See, for example, 67th Cong., 1st and 2nd Sess., *Hearings Before a Select Committee on Haiti and Santo Domingo*, 3 vols. (Washington, 1922); *Curr. Hist.*, XVI, 836-841 (Aug., 1922), "American Marines in Haiti Exonerated" (report of Senate select committee).

The opposing views respecting American intervention in Haiti and Santo Domingo may be gathered from the following references: J. W. Johnson, "Self-Determining Haiti," *Nation*, CXI, 236-238, 265-267, 295-297, 345-347 (Aug. 28-Sept. 25, 1920); C. Kelsey, "The American Intervention in Haiti and the Dominican Republic," *Annals Amer. Acad. Polit. and Soc. Sci.*, C, 109-202 (Mar., 1922); F. Hunt, *Whose Country is Haiti?* (Indianapolis, 1922); H. H. Weed, "The Subjugation of Haiti," *Searchlight on Congress*, VI, 18-19 (Feb., 1922); F. Bausman, *Seizure of Haiti by the United States* (New York, 1922); E. H. Gruening, "Conquest of Haiti and Santo Domingo," *Curr. Hist.*, XV, 885-896 (Mar., 1922); A. Ruhl, "What America is Doing for Haiti," *ibid.*, XXII, 734-742 (Aug., 1925); H. K. Norton, "Santo Domingo Under the

REFERENCES

CHAP.
XXX

- A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), I, 24-27; II, 112-114, 600-602, 679-683, 758-760.
- E. Kimball, *National Government of the United States* (Boston, 1920), Chap. XXII.
- W. W. Willoughby, *Constitutional Law of the United States* (New York, 1910), I, Chaps. XXII-XXXI.
- W. F. Willoughby, *Territories and Dependencies of the United States* (New York, 1905).
- V. J. Samonte, *The American System of Colonial Administration* (Iowa City 1925).
- G. W. Spicer, "The Constitutional Status and Government of Alaska," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XLV, 450-567 (1927).
- J. P. Nichols, *Alaska: A History . . . during its First Half Century under the Rule of the United States* (Cleveland, 1924), 83-140, 165-248, 383-418.
- G. A. Malcolm and M. M. Kalaw, *Philippine Government* (New York, 1923).
- V. D. Diamonon, *The Development of Self Government in the Philippine Islands* (Iowa City, 1920).
- M. M. Kalaw, *The Case for the Filipinos* (New York, 1916).
- , *Self-Government in the Philippines* (New York, 1919).
- F. B. Harrison, *The Corner-Stone of Philippine Independence: a Narrative of Seven Years* (New York, 1922).
- C. B. Elliott, *The Philippines to the End of the Military Régime* (Indianapolis, 1917).
- , *The Philippines to the End of the Commission Government* (Indianapolis, 1921).
- J. A. LeRoy, *The Americans in the Philippines* (Boston, 1914).
- D. C. Worcester, *The Philippines, Past and Present* (New York, 1914).
- J. A. Robertson, "The Philippines since the Inauguration of the Philippine Assembly," *Amer. Hist. Rev.*, XXII, 811-830 (July, 1917).
- II. C. Stimson, "Future Philippine Policy under the Jones Act," *Foreign Affairs*, V, 459-471 (Apr., 1927).
- D. P. Barrows, *History of the Philippines* (rev. ed., Yonkers, 1924).
- C. E. Russell, *The Outlook for the Philippines* (New York, 1922).
- D. R. Williams, *The United States and the Philippines* (Garden City, 1924).
- N. Roosevelt, *The Philippines: A Treasure and A Problem* (New York, 1926).
- Revised Treaty," *ibid.*, XXIII, 67-70 (Oct., 1925); E. E. Sorensen, "The Dawn of Haiti's New Era," *ibid.*, XXIII, 371-377 (Dec., 1925); H. K. Norton, "Self-Determination in the West Indies," *World's Work*, LI, 77-84 (Nov., 1925); *ibid.*, "American Imperialism in the Indies," *ibid.*, LI, 210-218 (Dec., 1925); *ibid.*, "The Ethics of Imperialism," *ibid.*, LI, 321-328 (Jan., 1926); A. Woods, "The Story of Santo Domingo," *Searchlight on Congress*, XI, 9-12 (Apr., 1926); M. M. Knight, "Haiti's Progress under American Protectorate," *ibid.*, XXIV, 351-358 (June, 1926); P. H. Douglas, "The American Occupation of Haiti," *Pol. Sci. Quar.*, XLII, 228-258, 368-396 (June-Sept., 1927); E. G. Balch (editor), *Occupied Haiti* (New York, 1927); C. E. Chapman, "The United States and the Dominican Republic," *Hispanic Amer. Hist. Rev.*, VII, 84-91 (Feb., 1927); *ibid.*, "The Development of the Intervention in Haiti," *ibid.*, VII, 299-319 (Aug., 1927).

- M. Storey and M. Lichauco, *The Conquest of the Philippines by the United States, 1898-1925* (New York, 1926).
- G. A. Malcolm, *Constitutional Law of the Philippine Islands* (2nd ed., Rochester, 1926).
- J. P. Laurel, *Local Government in the Philippine Islands* (Manila, 1926), Chaps. VIII-XVIII.

2. INSTRUMENTALITIES OF POPULAR CONTROL

CHAPTER XXXI

THE PEOPLE AS VOTERS

It is a proud boast of Americans that theirs is a country in which the people rule. What they mean is that the people set up their own governments, endow them with powers, fix the limits of their authority, elect their own officers, raise and settle their own issues, giving free vent to that somewhat intangible but important thing which we call public opinion. Any one who has studied American history to some purpose, or has followed even the brief analysis of the American national government presented in the foregoing pages, knows, of course, that the "popular" basis of our political system is not to be taken too literally. He knows, for example, that the constitution was never submitted to a popular vote; that constitutional amendments are adopted or rejected by state legislatures whose members have been elected, as a rule, with no reference whatever to the changes proposed; that presidential candidates sometimes win with only a minority of the popular ballots; that rarely more than seventy per cent, and sometimes not more than fifty per cent, of the qualified electors go to the polls, even when a president is to be elected; that seniority rules, caucus proceedings, and legislative by-play with which the people have nothing directly to do largely determine the fate of measures in Congress in which great national interests are involved. He knows, in short, that if the people rule, they rule a good deal of the time at rather long range and by decidedly roundabout processes or means.¹

Popular
control
and its
limitations

Nevertheless, fundamentally, the claim is justified. Ours is a government of the people, in the sense that the people are sovereign and have it in their power, both legally and actually, to make the government what they want it to be and cause it, at least eventually, to do what they want it to do. And it will be useful at this point to take some account of the channels or modes through which

¹C. A. Beard, "The Fiction of Majority Rule," *Atlantic Monthly*, CXL, 831-836 (Dec., 1927).

popular control over the government is exercised ¹—which means, in the main, to consider (1) the functions and composition of the politically enfranchised part of the population, *i.e.*, the electorate, and (2) the organization of the electorate in political parties.

In many foreign countries, and in a considerable number of our states, the electorate has four main functions: (1) to pass judgment upon proposed constitutional amendments, (2) to vote on ordinary legislative measures referred to it, and in some cases also to originate or propose them, (3) to elect executive officers, members of the legislature, and sometimes judges; and (4) to help the policy-framing authorities—by discussion, information, and criticism to discover the public will and carry it out. In relation to our national government, however, voters have not so many tasks. They agitate for or oppose constitutional amendments, but they do not vote upon them.² There is no national initiative or referendum for ordinary laws.³ In their national connections, the voters—aside from formulating and expressing opinion—merely elect officers. And the number that they elect is not large, *i.e.*, only the president and vice-president and the members of Congress. No administrative subordinates, and no members of the judiciary, are elective. Any given elector, therefore, votes only for (a) a set of presidential electors in his state—virtually, of course, for president and vice-president, (b) the two senators of his state, (c) a representative of his district in the House of Representatives, together with one or more congressmen-at-large if his state is entitled to such.⁴ So far as the national government is concerned, therefore, we have a “short ballot,” whatever must be said to the contrary for the state and local governments.

Considering, however, that two of the three great branches of the government are elective—at the top, if not throughout, in the case of the executive—the exercise of electoral power is a matter of first-rate importance; and arrangements for the suffrage are a necessary part of the national system. The makers of the constitution might conceivably have provided for a uniform national

¹The subject is considered here primarily with reference to the national government. Important aspects relating to state and local governments are dealt with in Chaps. XLII-XLVIII, XLVI-XLVII of the complete edition of this book.

²See p. 188 above for proposals to apply the initiative and referendum to amendments.

³An international agreement for popular referenda on declarations of war, except in cases of actual or threatened attack, was called for in the Democratic platform of 1924; also an “advisory” referendum on the question whether the United States should become a member of the League of Nations.

⁴See p. 353.

suffrage, quite distinct from the suffrage systems existing in the several states, as did the authors of the constitution of the federally organized German empire in 1867-71. But they chose, as did the framers of the constitution of the Swiss Confederation in 1848, to utilize for national purposes such electoral arrangements as each state had made, or might subsequently make, for its own use; and hence, until 1870, the constitution's sole provision on the subject was that persons voting for members of the lower house of Congress in each state should have "the qualifications requisite for electors of the most numerous branch of the state legislature."¹ The Fifteenth Amendment, adopted in the year mentioned, imposed the first direct constitutional restraint upon the states in this matter by forbidding any state (or the United States) to deny or abridge the "right" of citizens of the United States to vote "on account of race, color, or previous condition of servitude." The Nineteenth Amendment, adopted in 1920, laid a further restriction by forbidding any state (or the United States) to deny or abridge the "right" to vote "on account of sex." Limited only by these restraints, every state, in its constitution and laws, regulates suffrage qualifications as it desires. The two amendments tend to produce uniformity as far as they go; and their effects upon the total composition of the electorate have been very great. But, except in these respects, there is still the utmost room for variation.

From this it will be correctly inferred that the suffrage is regarded in this country as in the nature of a privilege rather than a right. It is a right for those people who have been endowed with it. But there is no inherent right to be so endowed. It is true that advocates of suffrage extension have always been prone to represent voting as a natural, if not a constitutional, right.² This argument was heard repeatedly during the long campaign for the enfranchisement of women. But political scientists are substantially agreed that the composition of the electorate is, in the United States no less than in other lands, a matter to be determined by considerations of expediency, and not on the theory that any particular class or classes of the people have an inherent right to be

The
suffrage a
privilege,
not a right

¹ Art. I, § 2, cl. 1. It will be recalled that presidential electors were chosen in each state—as they still are—as the legislature thereof should prescribe, and that senators were elected by the state legislatures. The Seventeenth Amendment, in 1913, applied to senatorial elections the same suffrage arrangements that were employed in electing members of the lower house.

² W. J. Shepard, "The Theory of the Nature of the Suffrage," *Proceedings of Amer. Polit. Sci. Assoc.*, VII, 106-136 (1913).

included; and the courts have repeatedly and unanimously held that the suffrage is not a right necessarily arising out of either national or state citizenship.¹ Nothing is more obvious than that there is, and can be, no necessary and fixed relation between citizenship and voting: children are citizens, but not voters; women are citizens, but until 1920 they were not voters in the majority of states. On the other hand, various states, as we have seen, have allowed persons to vote who are not citizens.

The
suffrage
prior to
1815

The history of the suffrage, particularly in the older states, is in the main a record of successive extensions of voting privileges to new groups of people—non-property-holders, small taxpayers, ex-slaves, women—although recent enfranchisements have been offset to some extent by new or increased restrictions. As we have seen, the suffrage in the states in the period of the adoption of the national constitution was commonly confined to property-holders, with occasionally a religious test in addition.² As a result, only a minority—in some cases a very slender minority—of the adult male population could vote. Vermont, whose earliest constitution (1777) quaintly provided that every freeman might vote “who has a sufficient interest in the community,” was admitted in 1791 as a manhood suffrage state; Kentucky followed in 1792; and in the same year New Hampshire gave up her taxpaying requirements. On the other hand, Tennessee, Ohio, and Louisiana, although western states, entered the Union with property or tax qualifications, and in 1799 Kentucky gave indication of the looming race problem by disfranchising negroes, mulattoes, and Indians. Thus, up to the War of 1812, the country as a whole showed no very decided drift in suffrage matters.³

Suffrage
changes,
1815-60

The period from 1815 to the Civil War, however, brought an impressive triumph of democratic principles. Appointive offices became elective. Requirements for office-holding were relaxed. Above all, the suffrage was broadened. Conditions of life in the newer communities of the expanding West made political democracy inevitable there; and the older states were gradually led to the same policy by the growth of restless urban populations, by the impatience of the manufacturing and mercantile classes with freehold qualifications which they could not meet, by the effects of

¹ *United States v. Anthony*, Fed. Cases 14459; *Minor v. Happersett*, 21 Wallace, 162. These decisions were rendered, in 1873 and 1874, in cases in which the question at issue was the right of women as *citizens* to vote.

² See p. 76.

³ K. H. Porter, *History of Suffrage in the United States*, Chap. II.

Jeffersonian political thought, and to some extent by the force of the western example itself. The upshot was that property qualifications were reduced and finally abandoned, taxpaying requirements were given up in all but a few states,¹ religious tests were entirely abolished, and in many states the suffrage was extended to aliens immediately upon declaration of intention to be naturalized. Woman's suffrage was widely proposed, although nowhere adopted at this time; and the benefits of the new laws rarely reached the free negroes.² But by 1860 most of the states had approximate manhood suffrage for whites.

CHAP.
XXXI

Since the Civil War the suffrage has been broadened mainly by the enfranchisement of negroes, including the freedmen, and by the conferring of the ballot upon women. A few negroes voted in certain northern states before 1860.³ But the general enfranchisement of people of color came as a result of new constitutions and laws adopted during the Reconstruction era. The southern states acted reluctantly, and only at the behest of Republican leaders of the victorious North. But the voting privileges of the ex-slaves and their descendants, as indeed of negroes in every part of the country, were supposed to be guaranteed for all time by the Fifteenth Amendment, which forbids any state to deny the right to vote on account of race, color, or previous condition of servitude.

Enfranchisement
of the
negroes

Demand for the enfranchisement of women was heard as early as the Jacksonian era, and much was made of it in some quarters during the later stages of the Abolition movement. No legislature or constitutional convention, however, at this time gave serious attention to the petitions presented to it on the subject; as a rule, proposals of the sort met only ridicule. After the Civil War the situation was different. The negro had been enfranchised; approximate manhood suffrage prevailed; and the advocates of votes for women could no longer be simply laughed out of court. The first notable triumph of the cause was in Wyoming, where in 1869 women were given the privilege of voting for territorial officers

The move-
ment for
woman
suffrage

¹ After Mississippi, admitted in 1817, no new state entered the Union with a property or tax-paying qualification. Property qualifications survived longest in Tennessee (to 1834), Rhode Island (to 1842), New Jersey (to 1844), Virginia (to 1850), and North Carolina (to 1856). Taxpaying qualifications were still maintained in 1860 in Massachusetts, Rhode Island, Pennsylvania, and North Carolina.

² K. H. Porter, *History of Suffrage in the United States*, Chaps. III, IV.

³ For the details see A. N. Holcombe, *State Government in the United States* (2nd ed.), 82-83.

on the same terms as men.¹ On being admitted to the Union in 1890, this territory continued its woman suffrage arrangements, and before the close of the century Colorado, Idaho, and Utah also became equal suffrage states. The movement then slackened. But about 1906 it gathered fresh impetus, and in five years (1910-14) the number of equal suffrage states was raised to eleven.²

Meanwhile the suffragists broadened their purpose so as to include general nation-wide enfranchisement. To this end, some urged an amendment of the national constitution requiring a state to submit the question of woman suffrage to its electorate on petition of as few as eight per cent of the voters. Others, feeling that this "states' rights" method was too slow and uncertain, threw their support to the "Susan B. Anthony amendment" (first brought forward in 1869), which proposed to forbid the United States or any state to withhold the ballot on account of sex. The movement finally centered upon the latter plan; and a brief period of sane but determined agitation brought complete success. The Nineteenth Amendment, embodying the Susan B. Anthony proposal, was adopted by Congress in 1919 and ratified by the requisite three-fourths of the states during the ensuing fourteen months. Proclaimed August 26, 1920, it had its first test at the national and state elections of the following November.

Female suffrage was advocated on many grounds. Most women are citizens. Many are property-owners, taxpayers, and managers of estates, and as such have the same interest in economical and efficient government that men have. Many have entered the professions and are doing work formerly done exclusively by men. Large numbers are wage-earners, whose compensation, hours of work, protection against illness and accident, and provision for old age are determined even more fully by legislation and by the action of commissions and other administrative authorities than are the same interests of men. It was argued, too, that voting power for women went naturally with the new sex equality of

¹ Kentucky in 1838 and Kansas in 1861 began to permit women to vote in school elections. Other states gradually took similar action, and in 1887 Kansas conferred full municipal suffrage.

² In addition to the four states named, Washington (1910), California (1911), Arizona (1912), Kansas (1912), Oregon (1912), Montana (1914), and Nevada (1914). In Illinois (1913) women were given the right to vote at elections to all offices within the control of the legislature, including most local offices, a few state offices, and the office of presidential elector.

these later days and would soon be universal among civilized peoples.¹ Finally, it was contended not only that women ought theoretically to exert a purifying influence in politics, but that in those states and lands in which they possessed the ballot they had already done so.² The principal counter-arguments were that woman's place is in the home, and that if she gives time and thought to politics her influence there will be proportionately diminished; that she can wield her greatest power for good socially, and even politically, by non-political means; that the bulk of women were already adequately represented through the votes of their husbands, fathers, and brothers; that the doubling of the electorate would entail greatly increased campaign expenditure and electoral costs; that after the novelty should have worn off, women would lose interest and would not go to the polls; and that they would be guided in voting, not by cool judgment, but by sentiment and emotion.

The women of the country as a whole—some twenty-five millions of them now—have had the suffrage only eight years. Furthermore, there are practically no statistics from which to learn how they vote. The results of two presidential and four congressional elections (besides numerous state and local elections) have, however, pretty clearly borne out the experience of those western states in which women have voted for a quarter of a century. This experience is, in brief, that women voters are strikingly like men voters: some are vigilant and intelligent, many are apathetic and uninformed; some are independent, others are willing to take orders from the party manager or boss; many go to the polls voluntarily and with scrupulous regularity, many others do not go

Results

¹ As early as 1870 voting privileges were granted to women in municipal and other local elections in England and Wales, Finland, and Bohemia. New Zealand gave women the right to vote in parliamentary elections in 1893, and thereafter the movement won a long succession of triumphs in Australia, Canada, and South Africa. Norway gave women full parliamentary suffrage in 1913, Denmark in 1915, Holland in 1919. In 1918 Great Britain similarly enfranchised six million women, *i.e.*, all over the age of thirty. And the post-war constitutions of Germany (1919), Austria (1919), Czechoslovakia (1920), and other lands made woman suffrage the rule throughout central Europe. P. O. Ray, "The World-wide Woman Suffrage Movement," *Jour. Compar. Legis. and Internat. Law*, I, 220-238 (Oct., 1919); C. C. Catt, "Suffrage Only an Episode in Age-Old Movement," *Curr. Hist.*, XXVII, 1-6 (Oct., 1927). At the end of 1927 women had suffrage on equal terms with men in twenty-three nations considered sufficiently independent to be qualified to enter the League of Nations. In all, women voted, under some conditions, in forty-one different countries.

² A careful report on the workings of woman suffrage during the first twelve years in Colorado is presented in Helen L. Sumner, *Equal Suffrage* (New York, 1909).

unless pressure is applied or inducements are offered. The proportions of the interested and the lethargic, of the well-informed and the ill-informed, do not appear to be very different in the two sexes. In short, while it would be impossible to show that woman's enfranchisement has had the bad effects that were predicted for it, it would also be difficult to prove that it has had definite beneficial results, except perhaps locally. It is sound in principle and entirely correct as a matter of policy, but it has not worked, and must not be expected to work, a revolution.¹

At the same time, the political life of the nation has taken on some new and interesting features. Legislation in Congress has shown some effect, and women voters point to the Sheppard-Towner Maternity Act of 1921, the independent-citizenship-for-married-women act of 1922, and three or four other important statutes as evidences of respect for their influence. Women have begun to be elected to high public offices, including two governorships in 1924. Above all, the country is covered with a net-work of state and local leagues of women voters, linked up in an active and influential national organization—the National League of Women Voters—all concerned primarily with educating women to vote with intelligence and discrimination, and with securing remedial legislation and other reforms, especially state and municipal. A less important National Woman's Party, also, has been working for equal legal rights for women, through the medium of state legislation and constitutional amendments, planned to include ultimately an "equal rights" amendment to the national constitution.

Looking over the electoral systems in the several states at the present time—under which somewhat over fifty per cent. of the total population is entitled to vote, as compared with only six per cent during the Revolutionary period—one notes five main suffrage qualifications: age, residence, citizenship, payment

General
suffrage
qualifica-
tions today

¹ E. M. Sait, *American Parties and Elections*, Chap. III; W. F. Ogburn and I. Goltra, "How Women Vote; a Study of an Election in Portland, Oregon," *Polit. Sci. Quar.*, XXXIV, 413-433 (Sept., 1919); E. Abbott, "Are Women a Force for Good Government?" *Nat. Mun. Rev.*, 437-447 (July, 1915); C. E. Russell, "Is Woman Suffrage a Failure?" *Century Mag.*, CVII, 724-730 (Mar., 1924); E. Kenton, "Four Years of Equal Suffrage," *Forum*, LXXII, 37-44 (July, 1924); S. A. Rice and M. W. Willey, "American Women's Ineffective Use of the Vote," *Curr. Hist.*, XX, 641-647 (July, 1924); E. N. Blair, "Are Women a Failure in Politics?" *Harper's Mag.* (Oct., 1925); C. P. Gilman, "Women's Achievements since the Franchise," *Curr. Hist.*, XXVII, 7-14 (Oct., 1927). N. M. Schoonmaker, "Where Does She Stand? Woman's Progress and Position in Politics," *Century Mag.*, CXIII, 354-360 (Jan., 1927), is an informing world-wide survey.

of taxes, and education.¹ The age necessary for voting in most parts of the world is twenty-one, and this is the rule in every one of the American states. The commonest requirement concerning residence is that the voter shall have lived in the state at least one year. But Rhode Island requires three years, and several states, especially in the South, require two years; while others, *e.g.*, Michigan, Indiana, and Nebraska, require only six months, and Maine requires only three months. In addition, some period of residence in the country and the election district is stipulated. In all states except two (Arkansas and Texas) it is necessary for voters to be citizens; these two permit aliens to vote, with certain slight restrictions, if they have formally declared their intention to become naturalized. Formerly, non-citizens were permitted to vote far more extensively than now. In 1894 sixteen states had such provisions, and in 1914 nine. The number was reduced to its present level during, and as a natural result of, the World War; and since the practice is objectionable on numerous grounds it is likely to disappear altogether from our system. Taxpaying, once a qualification widely maintained, survives as such in only one-third of the states. Arkansas and Tennessee require the voter to be able to show that he or she has paid a poll tax. Pennsylvania requires voters of the age of twenty-two and upwards to have paid a state or county tax within two years of the date of the election. Finally, most southern states make the payment of taxes one of the alternative qualifications which are employed to cut down the negro vote.

Educational, or "literacy," qualifications were in earlier times unusual. Today, however, they are in use, in some form (*i.e.*, ability to read or both to read and to write) in eighteen of the states and are authorized by constitutional provision in several others where the legislature has not yet seen fit to introduce them. Indeed, educational qualifications may be said, broadly, to have succeeded to the position once held by the property qualification, although they operate, of course, to exclude a very much smaller number of people. In some states the test is merely the proof of ability to read; in others it is the proof of ability to read and understand and also of ability to write. Special interest attaches to the New York system, under which, by law of 1923, reading and writing tests for all

Educa-
tional
qualifica-
tions

¹ Certain classes are everywhere debarred, *i.e.*, persons convicted of crime and inmates of asylums for the feeble-minded and insane.

² An act of 1924 extending citizenship to Indians living in tribal relations made voters of some 135,000 such persons. See p. 160.

CHAP.
XXXI

The
problem
of negro
suffrage in
the South

voters are prepared and administered by the educational authorities of the state. Elsewhere the tests are given by registration or election officials. The New York plan has much to commend it and is not unlikely to be adopted in other states.¹

Half of the states that have literacy tests are in the South, and in that section these restrictions, along with others, are adroitly used for a very special purpose, *i.e.*, to debar negroes from voting. The endowment of the freedmen with the suffrage at the close of the Civil War produced extraordinary and lamentable results. Led by conscienceless carpetbaggers from the North, and aided by the temporary disfranchisement of white men who had been active in the Confederate cause, the inexperienced and gullible negroes got possession of state legislatures, passed unjust and ill-considered laws, spent money like water on foolish projects, granted away important resources, and in other ways showed their lack of preparation for the exercise of political power.² By one means or another the white populations gradually recovered control, although South Carolina, Louisiana, and Florida were unable to send white representatives to Congress before 1876. Restored to ascendancy, the whites bent all efforts toward keeping the negroes from regaining power. Negro suffrage had been forced upon them by the victorious North; they were totally out of sympathy with it; outnumbered in many sections as much as four to one, they felt that their security and prosperity were absolutely dependent upon control of their state and local governments. This meant, of course, to contrive some means of preventing the Fifteenth Amendment from having its full intended effect. For fifteen or twenty years the measures employed to this end were extra-legal, and often clearly illegal. Ku-Klux demonstrations, arbitrary arrests on the eve of elections, theft of ballot-boxes, repeating, false counting of votes, and other forms of intimidation and corruption became exceedingly common, and were generally condoned by the authorities, including the courts.

About 1890 southern people began to feel that the negro's disfranchisement ought to be regularized by legal, and even constitutional, provisions. It would, of course, be contrary to the

¹J. B. Phillips, "Educational Qualifications for Voters," *Univ. of Colorado Studies*, III, 55-62 (Mar., 1906); F. G. Crawford, "The New York State Literacy Test," *Amer. Polit. Sci. Rev.*, XVII, 260-263 (May, 1923); XIX, 788-790 (Nov., 1925); W. J. O'Shea, "Literacy Test of Voters is Pronounced a Success," *N. Y. Times*, Jan. 4, 1925.

²See W. L. Fleming, *Documentary History of Reconstruction* (Cleveland, 1905-06) II, Chaps. VIII, XII-XIII.

Tests intended to disfranchise the negroes

Fifteenth Amendment to deny the ballot to negroes as such. But by imposing educational or taxpaying tests, carefully devised to catch the negro without debarring any considerable number of white people, the essential object could still be attained. And the history of the suffrage in the South during the past thirty-five years has been mainly a story of the adoption and administration of discriminatory regulations of this character. In Mississippi—the first state to incorporate clauses for this purpose in its constitution (1890)—the voter must have paid all taxes assessed against him, including a poll tax of two dollars, and must be able either to read any section of the state constitution or to understand it when read to him and to give a reasonable interpretation thereof.¹ The uneducated negro, being proverbially careless, is more than likely to be unable to produce his tax receipt; on the other hand, the registration officers are prone to “forget” to ask the white voter to produce a receipt. Comparatively few Mississippi negroes, furthermore, can read; still fewer can give an interpretation of the state constitution which will be accepted as “reasonable” by white officials with a strong predisposition against negro voting. If, furthermore, in replying to detailed personal questions which are put to him the candidate for registration deviates by a jot from the truth, he becomes guilty of perjury, for which he may be disfranchised. Here again the authorities may apply wholly different standards to applicants according to their color.²

The Mississippi plan has served more or less as a model for other states. It proved, however, to have one drawback. Notwithstanding judicious administration, it did not sufficiently protect the illiterate white; and in certain states this defect was partially remedied by so-called “grandfather clauses.” South Carolina, in 1895, excused for three years from the regular educational test all men, otherwise qualified, who were voters, or whose progenitors were voters, in 1867. The object was frankly to enable the illiterate whites to get their names on the roll of permanent voters, while keeping the negroes from doing so. The Louisiana constitution of 1898, after requiring voters to be able to read and write, or in lieu of that to be the owners of property valued at not less than \$300, went on to exempt from both of these qualifications

CHAP.
XXXI

“Grand-
father
clauses”

¹ The requirement of residence, also, has been raised to two years in the state and one year in the election district.

² T. F. Jones, “Powers of the Southern Election Registrar,” *Outlook*, LXXXVII, 529-531 (Nov. 9, 1907); W. F. White, “Election by Terror in Florida,” *New Republic*, XXV, 195-197 (Jan. 12, 1921).

CHAP.
XXXI

any person who was himself, or whose father or grandfather was, on January 1, 1867, or on any prior date, a voter anywhere in the United States. The benefit of this exemption fell, and was intended to fall, almost exclusively to the illiterate and poor whites.

Their
effectiveness

At one time or another, all of the states of the "Solid South" brought devices of this sort into play, with the thinly-disguised purpose of making it difficult or impossible for the negro to take part in politics and government. The plan was not to bar people of color by direct prohibitions, but rather to set up unusual qualifications which could be so interpreted and administered as to reduce negro voting to a minimum; and how successful it has been is indicated by the belief of the best observers that in some states not one adult negro in a hundred ever casts a ballot and that, throughout the South as a whole, probably less than ten per cent of the adult negro population is on the registration lists. Having served their purpose, the grandfather clauses have disappeared; such a feature of the Oklahoma constitution of 1907 was, indeed, declared void by the Supreme Court in 1915,¹ and no clause of the kind is now in force.

Exclusion
of negroes
from
Democratic
primaries

The desire to keep the ballot in the hands of the whites is, nevertheless, as keen as before, and of late some interesting new ways of securing this end have been devised. In most southern states the Democratic party is so securely in control that nomination at a Democratic primary is tantamount to election. Accordingly, all purposes will be served if negroes are kept from participating in the primaries, and as many as eight states have enacted laws with this object definitely in view. Seven of these states made no attempt to go beyond giving the state central committee of each party the power to prescribe qualifications for voting in addition to those laid down in the constitution and the statutes²—on the assumption that the qualifications so prescribed will, in the case of the majority party, be found to be possessed only by white Democrats. Texas, however, went farther by writing into her law a provision that "in no event shall a negro be eligible to participate in a Democratic primary election held in the state of Texas, and should a negro vote in a Democratic primary election such ballot shall be void and election officials shall not count the same." This bold provision was naturally challenged; and although a United States district court, citing the

¹ *Guinn v. United States*, 238 U. S., 347 (1915).

² It should be noted that two states outside of the South, *i.e.*, Delaware and Idaho, have also done this.

decision in *United States v. Newberry*,¹ held the stipulation valid as within the police power of the state, the Supreme Court, in 1927, held it unconstitutional as being in conflict with the clause of the Fourteenth Amendment which guarantees the equal protection of the laws.² Not to be frustrated, however, the Texas legislature, which happened to be in session when this decision was announced, forthwith passed a new "white primary" law giving every political party in the state, through its state executive committee, the power to "prescribe the qualifications of its own members," and thus to determine "who shall be qualified to vote or otherwise participate in such political party." In other words, the less direct, but equally effective, method of handling the matter already in use in Alabama, Florida, and other states was adopted. In Louisiana this plan has been sustained by the supreme court on the ground that the legislature has not undertaken to fix any political qualifications of voters at a primary, but has "wisely left the matter to the state central committee of the several parties . . . where it originally resided and naturally belongs."³ The new Texas law, like the others, is clearly a subterfuge, and whether it or any of its counterparts in the other states would be sustained by the federal Supreme Court, if tested before that tribunal, is—to say the least—doubtful.⁴

All this arouses, in these days, only sporadic protest. Southern whites regard the policy as natural and inevitable. The disfranchised negroes are, as a rule, indifferent. Even in the North there is no strong disapprobation; in 1912 the Republican party significantly stopped putting in its platform the time-honored denunciations of the southern laws and practices on the subject. The restrictive regulations—particularly as administered by registration and election officials—are no doubt objectionable, in that they set up discriminations which are really based on considerations of race, and also in

Merits
of the
southern
procedure

¹ See p. 352, note 2.

² *Nixon v. Herndon et al.*, Supreme Court Reporter, XLVII, p. 446. The Fourteenth Amendment, the court said, offered so simple and obvious a basis for a decision that it had not been deemed necessary even to consider the bearing of the Fifteenth Amendment upon the case. After the decision was announced, lawyers differed on the question of whether the court had overruled its definition of primaries in the *Newberry* decision, with the effect of giving the national government power to regulate state primaries. The best opinion was, however, that if the court had intended to overrule the *Newberry* definition and hold a primary to be an election, the Fifteenth Amendment, rather than the Fourteenth, would have been invoked in setting the law aside.

³ *State v. Michel*, 121 La. 393.

⁴ J. E. Pate, "The Texas White Primary Law," *Nat. Mun. Rev.*, XVI, 617-619 (Oct., 1927); R. W. MacDonald, "Negro Voters in Democratic Primaries," *Texas Law Rev.*, V, 393-400 (June, 1927).

that they are deliberate evasions of the fundamental law of the country. Most southern negroes, however, are poorly qualified for political power; many of them manifest no desire to vote; some of their leaders consider that the race will gain more in the long run by accepting white control; and the heavily outnumbered white populations (in several of the states) must be conceded to have the logic of cold facts largely on their side. The initial mistake was made when the freedmen were enfranchised *en masse* sixty years ago.¹

Penalty for
disfranchisement
not enforced

With a view to penalizing states which restrict the suffrage, the Fourteenth Amendment provides that if a state denies or abridges the right of any of its male inhabitants, being twenty-one years of age and citizens of the United States, to vote, "except for participation in rebellion, or other crime," the basis of representation in such state shall be reduced in the proportion which the number of unenfranchised male citizens bears to the whole number of male citizens twenty-one years of age in the state. Attempt has been made to show that this penalty was intended to apply only in case of denial of the suffrage on account of race or color.² But the phraseology of the amendment admits of no such interpretation: Massachusetts is quite as liable to a reduction of its quota of representatives in Congress because of its general educational qualifications as is Louisiana on account of its restrictions aimed at the negro. In point of fact, this provision has never been carried out. The average number of voters in the South who elect a representative to Congress is very much smaller than the average number in the North, and loud complaint has long been made, mainly by northern Republicans. Enforcement of the constitutional penalty would, however, raise embarrassing questions and would have doubtful political effects. Consequently, although numerous bills on the subject have appeared in Congress, all have fallen by the wayside at one stage or another.

Non-voting

The census of 1920 showed the total population of the continental United States to be 105,710,620. Of this great body of people, somewhat more than fifty-four millions were citizens twenty-one years of age or over. When it is added that in the presidential

¹ E. M. Sait, *American Parties and Elections*, Chap. 11; J. C. Rose, "Negro Suffrage; the Constitutional Point of View," *Amer. Polit. Sci. Rev.*, I, 17-43 (Nov., 1906); A. H. Stone, *Studies in the American Race Problem* (New York, 1908).

² E. G. Murphy, "Shall the Fourteenth Amendment be Enforced?" *No. Amer. Rev.*, CLXXX, 109-133 (Jan., 1905).

election of that year less than half of these potential voters went to the polls, we note one of the most surprising, and many people think one of the most discreditable, aspects of our political life.¹ Many of these non-voters had failed to register; many who registered neglected to go to the polls; many who went to the polls voted only for certain offices and not for all. The proportion of the electorate that actually votes has been generally declining for thirty years. In 1896, it was (taking the vote for president alone) eighty per cent; in 1900, seventy-three per cent; in 1904, sixty-seven and one-half per cent; in 1920, forty-nine per cent; and in 1924— notwithstanding an unusual amount of special effort to “get out the vote”—it was brought up to only slightly more than fifty-one per cent.² These figures compare very unfavorably with Great Britain, where parliamentary elections usually bring out from seventy to eighty per cent of the electorate, and with Germany, where, since 1918, the proportion has risen once or twice beyond eighty-five percent. In the Japanese parliamentary election of 1928—the first to be held after the introduction of manhood suffrage—the proportion was eighty-one per cent.

The causes of our deficiency are many. A quarter of a million men and women are non-voters because of having no legal residence outside of the District of Columbia. Large numbers at every election, especially in the cities, are debarred because of not having resided long enough in the state or election district. Ten or more southern states, to all intents and purposes, have but one party and because of the lack of real contests, together with the virtual disfranchisement of the negroes, yield an exceedingly small vote: in South Carolina in 1924 only six per cent of the voters exercised their right of suffrage, and in Georgia and Mississippi only about twelve per cent.³ Many voters in all parts of the country are prevented from casting their ballots by illness or other valid reasons; although it should be noted that the enactment of absent-voting laws in all but three states has largely removed one great obstacle

¹ The exact figures for 1920 are: number of eligibles, 54,165,907; total vote for president, 26,646,273; percentage, 49.1.

² The exact figures for 1924 are: number of eligibles, 56,941,584; total vote, 29,138,935; percentage, 51.2. A tabulation by states will be found in N. Y. *Times*, Jan. 26, 1925. Cf. A. M. Schlesinger and E. M. Erickson, “The Vanishing Voter,” *New Republic*, XL, 162-167 (Oct. 15, 1924); S. S. Butler, “Women Who Do Not Vote,” *Scribner’s Mag.*, LXXVI, 529-533 (Nov., 1924); K. F. Gerould, “Some American Women and the Vote,” *ibid.*, LXXVII, 449-452 (May, 1925). The total vote in the congressional elections of 1926 was approximately 22,000,000.

³ G. W. Johnson, “The Dead Vote in the South,” *Scribner’s Mag.*, LXXVIII, 38-44 (July, 1925).

of earlier days, *i.e.*, absence from the voting precinct.¹ To some extent, voters are discouraged or thwarted by legal and administrative obstacles. To some extent, they are deterred by timidity, by disgust with politics, by dislike of woman suffrage, or even by opposition to political action generally. After all allowances are made, however, one is tempted to surmise that the most common cause is no one of these things, but simple indifference and inertia; and an extensive first-hand study of non-voting in the city of Chicago, carried to completion in 1924, bears out this opinion.² Sometimes there is indifference toward a particular election only. But more often it extends to elections generally; and the Chicago investigation shows it specially prevalent among younger voters, in poorer neighborhoods, and among housewives, but only slightly more so among people of foreign than among those of native birth.

Remedies

Whatever the reasons, the stay-at-home vote has attained such proportions as to have attracted a great deal of attention; every important election brings a fresh round of remorseful and hortatory discussion of the subject. Two main considerations, however, are always to be borne in mind. The first is that, contrary to very general assumption, there is no particular virtue in mere numbers of votes. Most get-out-the-vote efforts begin and end in the attempt to induce men and women to go to the polls, regardless of whether they know anything about the issues or the candidates. The thing to be aimed at is not simply voting, but intelligent and interested voting; and energy spent upon getting ballots into the hands either of persons who are insufficiently informed to make intelligent decisions or of persons who are informed but have no clear opinions is misdirected. The second consideration is that the solution for the problem lies, not in dragging unwilling electors to the polls, but in gradually improving the electoral system and raising the tone of political life. "What we most need," writes one of the keenest students of the subject, "is to make registration less of an irksome task, the ballot simpler (with provision for the representation of minorities), elections less frequent, the issues clearer, party cleavages more distinct and vital, the party programs less evasive, and, above all, to organize our campaigns of civic education so that they will be more comprehensive, more persistent, and more effec-

¹ P. O. Ray, *Political Parties and Practical Politics* (3rd ed.), 280-287; "Absent-voting Laws," *Amer. Polit. Sci. Rev.*, XVIII, 321-325 (May, 1924); "Absent-voting Legislation, 1924-1925," *ibid.*, XX, 347-349 (May, 1926).

² C. E. Merriam and H. F. Gosnell, *Non-Voting; Causes and Methods of Control* (Chicago, 1924), Chap. vii.

tive in reaching those sections of the electorate which have enough intelligence to understand what it is all about."¹ A more direct and immediate solution has often been proposed, in the form of legislation making voting compulsory. Several foreign countries—Belgium, Denmark, Holland, Czechoslovakia, Argentina, etc.—have experimented more or less successfully with such a system, and the constitutions of two of our states, *i.e.*, Massachusetts and North Dakota, authorize laws on the subject to be enacted if the legislature sees fit. There are, however, practical objections to the plan, and the American mind is not likely to be won over to it.

CHAP.
XXXI

REFERENCES

- P. O. Ray, *Introduction to Political Parties and Practical Politics* (3rd ed., New York, 1924), Chap. XII.
- E. M. Sait, *American Parties and Elections* (New York, 1927), Chaps. I-III, XXI.
- R. C. Brooks, *Political Parties and Electoral Problems* (New York, 1923), Chap. XIV.
- A. N. Holcombe, *State Government in the United States* (2nd ed., New York, 1926), Chaps. IV, VI.
- J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), II, Chaps. XCIX, CXII.
- F. A. Cleveland, *Organized Democracy* (New York, 1913), Chaps. X-XII.
- F. R. Kent, *The Great Game of Politics* (Garden City, 1923), 279-286.
- A. de Tocqueville, *Democracy in America*, trans. by Reeve (3rd ed., Cambridge, 1863), I, Chaps. IV, XIII.
- K. H. Porter, *History of Suffrage in the United States* (Chicago, 1918).
- , "Suffrage Provisions in State Constitutions," *Amer. Polit. Sci. Rev.*, XIII, 577-592 (Nov., 1919).
- G. H. Haynes, "Educational Qualifications for the Suffrage in the United States," *Polit. Sci. Quar.*, XIII, 495-513 (Sept., 1898).
- W. A. Robson, "Compulsory Voting," *Polit. Sci. Quar.*, XXXVIII, 569-579 (Dec., 1923).
- W. B. Munro, *The Invisible Government* (New York, 1928), Chap. II.
- , "Is the Slacker Vote a Menace?" *Nat. Mun. Rev.*, XVII, 80-86 (Feb., 1928).
- C. E. Merriam and H. F. Gosnell, *Non-Voting; Causes and Methods of Control* (Chicago, 1924).
- H. F. Gosnell, *Getting Out the Vote; an Experiment in the Stimulation of Voting* (Chicago, 1927).
- B. A. Arneson, "Non-Voting in a Typical Ohio Community," *Amer. Polit. Sci. Rev.*, XIX, 816-825 (Nov., 1925).
- W. Lippman, "The Causes of Political Indifference Today," *Atlantic Monthly*, CXXXIX, 261-268 (Feb., 1927).
- ¹ W. B. Munro, "Is the Slacker Vote a Menace?" *Nat. Munic. Rev.*, XVII, 86 (Feb., 1928).

- E. G. Murphy, *Problems of the Present South* (New York, 1904).
- F. G. Caffey, "Suffrage Limitations at the South," *Polit. Sci. Quar.*, XX, 53-67 (Mar., 1905).
- J. M. Mathews, "Legislative and Judicial History of the Fifteenth Amendment," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XXVII, Nos. 6-7 (1909).
- C. C. Catt, *Woman Suffrage by Constitutional Amendment* (New York, 1917).
- C. C. Catt and N. R. Shuler, *Woman Suffrage and Politics* (New York, 1923).
- E. C. Stanton, S. B. Anthony, and M. J. Gage [eds.], *History of Woman Suffrage*, 4 vols. (New York, 1881-1902).
- I. H. Irwin, *The Story of the Woman's Party* (New York, 1921).
- W. MacDonald, *A New Constitution for a New America* (New York, 1921), Chap. XII. Advocates a uniform suffrage law for national elections.

CHAPTER XXXII

POLITICAL PARTIES AND NATIONAL ELECTIONS

In their capacity as voters, the people of the United States function most conspicuously and effectively when organized in more or less permanent associations known as political parties. It would be too much to expect that voters should always, or indeed ever, entirely agree upon who should be put in the public offices, or upon what the government should be and do. What happens is that those who think alike in such matters come together in some sort of an organization, whose broad purpose may be to attract support for a body of political doctrine, but whose immediate end is pretty certain to be to secure control of the government through the winning of elections and the holding of public office. Control of the government means "the power to make and administer law, to levy, collect, and expend public revenues, to undertake and carry on public works, to hold the stewardship of public property, to grant public franchises, to fill public offices, to distribute public employments—to be, in fact, for a given term, *the public* of cities, of states, and of the great nation, in all the handling of their stupendous corporate affairs."¹

Why
parties
exist

Although their history contains many sordid and selfish chapters, political parties are powerful forces for good in a democracy: they educate and organize public opinion by keeping the people informed on public matters, by discussing public questions in the presence of the people, and by securing not only discussion before the people, but, what is quite as important, discussion by the people. In our own country, and in most other democratically governed countries, political parties have become so indispensable that it is hard to conceive the possibility of getting along without them. They constitute the most important channel through which the ordinary citizen can exert a direct influence in the formulation of public policy and the execution of that policy when enacted into law; he finds almost his only point of direct and vital contact with his

Party uses

¹ J. N. Larned, "A Criticism of Two-Party Politics," *Atlantic Monthly*, CVII, 291 (Mar., 1911).

government when, at the ballot box on primary and election days, he votes for the candidates of one party or another for state and national offices. Parties perform their highest and most legitimate function when they serve as agencies for the application of political, social, economic, and moral principles to the life of the people. Without organized political action, there can be little real improvement of social conditions and few vital changes in government itself.

Any one, therefore, who desires something more than merely a superficial knowledge of the American system of government must study two sets of political institutions. One of these may conveniently be described as the machinery of government; the other, as the party system. The first includes the formal organization or structure of our national, state, and local governments, with their executive, legislative, and judicial branches. These formal governmental institutions are more or less fully outlined in the national and state constitutions, in municipal charters, and in the national and state statutes which amplify constitutional provisions. But a study which is restricted to such documents will leave one quite uninformed on the real nature and actual workings of government in the United States; for the effect of many constitutional and statutory provisions, in actual operation, has been widely different from that originally intended. In very many cases this circumstance is to be explained by the customs or unwritten law of political parties in operating the machinery of government. To appreciate how true this is, one has but to recall references in the preceding chapters to the way in which the original purpose of the electoral college has been completely transformed through the rise of political organizations;¹ to the added importance attaching to the presidential office by virtue of the fact that the president is the titular head of his party;² and to the fact that the existence of rival parties gives character and color to the whole organization and procedure of Congress, and to much of the legislation enacted by that body.³ Constitutional documents and statutory enactments create an inert piece of governmental machinery; the motive power for running this machinery and the lubricant which keeps its different parts operating with a fair degree of smoothness are furnished by political parties. Despite their fundamental importance, however, not a word is said about them in the national constitution

¹ See pp. 209-211.

² See pp. 269-271.

³ See Chaps. xxii-xxiii; also W. Wilson, *Constitutional Government in the United States*, Chap. viii.

and very little in state constitutions; they have developed to maturity as extra-constitutional, and also largely as extra-legal, institutions.¹

CHAP.
XXXII

However the party affiliations of individual citizens may be determined—whether by careful study and deliberate decision or by inheritance or environment—the mass of American voters have supported one or the other of two great parties that have occupied the center of the political stage throughout most of the period since the adoption of the constitution. This two-party system, as it is called, is a distinguishing characteristic of the politics of the United States, and also of all English-speaking countries; and it is found practically nowhere else. Here in the United States we began our history under the constitution with the Federalist and Jeffersonian Republican parties; then followed a period in which most voters found themselves in either the Whig or the Democratic party; and since the Civil War the great majority of voters have called themselves Democrats or Republicans.

The two-
party
system

From the first quarter of the nineteenth century, however, there have been many voters, in the aggregate, who for one reason or another have been dissatisfied with the principles, policies, or leadership of the two major parties for the time being, and who have accordingly started independent or “third-party” movements. First among these organizations came the Anti-Masonic party in 1826 and the years immediately following; then the Liberty party, which appeared about 1840; followed by the Free Soil party, in 1848; the Native-American, or Know Nothing, party, in the early fifties; the Republican party, which was at first a minor third party, in 1854-56; the Prohibition party, in 1872; the Greenback party, in 1876; the Populist party, about 1890; and the Socialist party, about 1897. These and several other minor parties have served a very useful purpose, and at times one or another of them has polled enough votes in pivotal states to change the result of a presidential election.²

Minor
parties

¹ Nearly a century and a quarter elapsed before Congress, in 1907, passed the first law regulating party activities; and for about a hundred years there was very little state legislation on the subject.

² The political history of New York affords several examples. In 1844 the Liberty party's vote in that state was sufficient to throw the state's electoral vote to James K. Polk, the Democratic candidate, and so to ensure his election over the Whig candidate, Henry Clay; in 1848 the Free Soil party drew away so many votes from Cass, the Democratic nominee, that the Whig candidate, General Taylor, carried the state; and in 1884 the Republicans held the Prohibitionists responsible for the loss of the state and the consequent election of Grover Cleveland. In 1912, and again in 1916 and 1920, no less than six

Before the adoption of the constitution there were no political parties in the sense in which that term is now generally understood; as durable and disciplined organizations, parties first appeared in the later portion of Washington's first administration. Their history from that day to this may conveniently be divided into half a dozen fairly distinct periods, namely, (1) Federalist supremacy (1789-1800); (2) Jeffersonian Republican supremacy (1801-1816); (3) "personal politics" (1816-1832); (4) Democratic and Whig rivalry (1832-1860); (5) Republican supremacy (1861-1884); and (6) Democratic and Republican rivalry, since 1884.¹

1. Feder-
alist
supremacy
(1789-
1800)

The principal issues between the Federalists and the Jeffersonian Republicans arose out of (1) attitudes toward government and individual liberty; (2) questions of foreign policy; (3) differences of social and economic interest; and (4) questions of constitutional construction.

Issues:
(a) Liberty
and gov-
ernment

The Federalists, either by nature or from economic motives, found it easy to believe in strong government. To them, government existed not merely for the protection of life and property, but as an important agency for the promotion of economic prosperity; liberty of the individual was a matter of secondary importance to the establishment of a strong national government. To their opponents, on the other hand, all governments were a necessary evil, to be curbed at every possible point in the interest of individual liberty; the less government there was the better. The national government, in particular, they felt should be restricted in its operation to the narrowest possible sphere compatible with the general welfare. To secure the highest attainable degree of liberty for the individual was, in their view, the all-important objective of organized government.²

(b) Ques-
tions of
foreign
policy

In the second place, the Federalists and Jeffersonians were sharply divided over the question of what should be the official attitude of our government toward the principal nations engaged in the wars arising out of the French Revolution. The Federalists, closely bound to England by commercial ties and feeling scant sympathy for the democratic movement in France, naturally fav-

national parties had presidential tickets. In 1924 there were nine such tickets in some states: Republican, Democrat, Progressive, Socialist-Labor, Worker's Party, Prohibition, Commonwealth, Land, American, and Peoples.

¹ These dates must not be taken as rigidly marking the limits of the periods mentioned, for each period shaded off gradually into the succeeding period.

² C. E. Merriam, "The Political Theory of Thomas Jefferson," *Polit. Sci. Quar.*, XVII, 24-45 (Mar., 1902), and *History of American Political Theories*, Chap. iv.

ored an alliance with England—at least a policy of neutrality. The Republicans, instinctively sympathizing with the movement which had overthrown the French monarchy and gratefully remembering the help rendered by France to our cause during the American Revolution, favored alliance with the French. It is difficult to realize today how deeply this line of division cut into the early history of our national politics.

The rivalry of the Federalists and early Republicans also reflected the clash of economic interests and different social standards.¹ The strength of the Federalist party lay in the more populous sections of the North and East, especially the centers where trade and commerce flourished, although not a few of the large-scale tobacco planters in Virginia and rice planters in South Carolina should also be counted in. Identified with that party, one was pretty certain to find the more aristocratic elements, the commercial classes, and such capitalistic groups as existed—the people who had been chiefly instrumental in bringing about the adoption of the new constitution, and who cordially approved the fiscal policies of Alexander Hamilton. The Jeffersonian party, on the other hand, recruited its strength in part from the small tradesmen and mechanics in the towns along the coast, but mainly from the more sparsely settled and frontier sections, especially in the South and West, where agriculture rather than trade was the dominant economic interest.² Here, love of individual liberty was strongest; here, the expansion of the powers of the national government was viewed with alarm; here, class distinctions were less sharply drawn than in the North and East, and social conditions more nearly approached democratic ideals.

Over important questions of constitutional interpretation also the Federalists and early Republicans were sharply divided at first. The Federalists favored a liberal—their opponents said a loose—construction of the constitution; in all cases of doubt as to whether the national government had power to act, the Federalists attributed the disputed power to that government. They believed in permitting the national government to exercise not only the powers expressly granted in the constitution, but also all powers that might fairly be implied from those expressly granted, in this way impart-

CHAP.
XXXII

(c) Con-
flicting
economic
and social
interests

(d) Consti-
tutional
interpre-
tation

¹ C. A. Beard, *Economic Origins of Jeffersonian Democracy* (New York, 1915), Chaps. I, VI, VII, XII, XIV; and "Some Economic Origins of the Jeffersonian Democracy," *Amer. Hist. Rev.*, XIX, 282-298 (Jan., 1914).

² C. A. Beard, *Economic Interpretation of the Constitution of the United States*, Chaps. V, X, XI.

ing validity to measures of dubious constitutionality but of far-reaching importance to the commercial interests that found a champion in Hamilton. To Jefferson and his followers, on the other hand, these canons of constitutional construction seemed fraught with grave danger to individual liberty, and objectionable also in that they sanctioned policies which seemed seriously in conflict with the economic interests of the less substantial classes in the country. The Jeffersonians therefore advocated a strict—their opponents said a narrow—interpretation of the powers of the national government, such that the government would have been limited to those means which were absolutely indispensable, not merely convenient and not prohibited, for carrying out expressly granted powers; and all cases of doubtful sanction were to be resolved against the national government. By thus restricting national authority to the narrowest possible sphere of activity, individual liberty would be protected from a potentially despotic or tyrannical government.¹

This difference between the earliest of our great parties over questions of constitutional construction has been regarded by many as of fundamental importance; and at times it has appeared to work at least a theoretical cleavage between the dominant parties of later periods. Nevertheless, it soon lost all real significance as an actual guide to action in practical politics; for, as we have seen, when the Jeffersonian Republicans came into power in 1801, they found it expedient tacitly to accept and to act upon the liberal constitutional views of their opponents; and in later periods, when important measures were favored or opposed by Whigs, Democrats, or Republicans as constitutional or as unconstitutional, everything has depended upon which party was in power at the time. The party of the "Ins" has always stood more or less frankly for liberal construction of governmental powers; the party of the "Outs" for the time being has, with almost equal regularity, denounced as unconstitutional the important measures favored by the opposing party; neither of the great parties has, therefore, been entirely consistent on questions of constitutional interpretation.

The reaction against the weakness and failures of the Confederation period, especially among the substantial business interests of the day, placed the advocates of a strong national government in control of all three branches of the government in 1879 and

¹ These divergent views first appeared in 1791 in connection with the question of the right of Congress to charter a bank to serve as the fiscal agent of the new government. See pp. 128-130.

kept them in such control throughout Washington's two administrations.¹ During John Adam's administration the Federalists continued in power, but steadily declined in actual strength, partly through factional differences, partly as the result of interference with individual liberty in the enforcement of the Alien and Sedition acts, and as a consequence of the burdensome taxation authorized for an anticipated, but unrealized, war with France. Taking advantage of these embarrassments, and of the reaction against Federalist centralizing and aristocratic tendencies, Jefferson organized the various elements of opposition into a coherent party which first secured control of the executive and legislative branches of the government in the presidential election of 1800,² and thereafter remained in control, except for two brief intervals, for sixty years.

During the sixteen years, or thereabouts, immediately following the party revolution of 1800, the Federalists maintained a constantly dwindling opposition, whose chief strength lay in New England. Although never again in control of Congress or the presidency, they had the satisfaction of witnessing the gradual "federalization" of the opposing party through its tacit acceptance of most of the results achieved under Federalist auspices. The Jeffersonians, especially after the purchase of Louisiana, became, indeed, almost as liberal in their views of constitutional interpretation as the Federalists themselves; and in the enforcement of the Embargo and Non-Intercourse acts they were guilty of quite as grave interference with individual liberty as the Federalists had ever been. As for the Federalists themselves, the disloyal attitude of many of their New England leaders and members toward the War of 1812, culminating in the Hartford Convention of 1814, completely discredited the party. Thenceforth, it ceased to be a factor in national politics, a consummation which was facilitated in no small degree by the conciliatory attitude adopted by Jefferson toward propertied groups which had been the backbone of the Federalist party. As time went on, it steadily became easier for Federalists, especially the younger generation, to merge with the Jefferson following, until, after 1816, party lines practically disappeared.

¹ Washington himself was neither by instinct nor by training a strong party man; indeed, he looked upon parties as evil institutions and warned his countrymen against them, though as time went on he more and more leaned to the Federalist side. See his Farewell Address, in L. B. Evans [ed.], *Writings of Washington* (New York, 1908), 539.

²A. D. Morse, "Causes and Consequences of the Party Revolution of 1800," *Amer. Hist. Assoc. Report* (1894), 531-539.

CHAP.
XXXII3. Period
of personal
politics
(1816-
1832)

The third period of party history, beginning here, used to be called the "era of good feeling," because, so far as national elections were concerned, all voters seemed to be merged in one great party, the party of Jefferson. Actually, however, it was far from being an era of good feeling, at all events among the party leaders and their immediate followers. Around half a dozen outstanding personalities bitterly hostile factions gradually grouped themselves in the years following Monroe's election in 1816, all claiming to be followers of Jefferson and true exponents of Republican principles; and for this reason the period is more appropriately called "the era of personal politics." There were, for example, the "Adams men," looking to John Quincy Adams for leadership; the "Clay men," similarly looking to the popular young "Harry of the West;" the numerous and noisy followers of General Andrew Jackson, the hero of New Orleans. Smaller, but not inconsiderable, groups supported the presidential aspirations of William H. Crawford of Georgia, a forerunner of the later strict states' rights school of politicians. Others ardently admired the winsome young John C. Calhoun, who was just entering upon a long and brilliant congressional career and had not, as yet, abandoned his strong nationalistic views to become the foremost champion of states' rights. Finally, a smaller group supported DeWitt Clinton of New York, and vigorously applauded his attacks upon the so-called "Virginia dynasty" which had so long seemed to dictate the choice of presidents.

Transi-
tional
period

This period in which personalities counted for more than policies was essentially a transitional stage in which the new national issues that were to form the basis of party alignment for the next generation were gradually taking shape. The followers of Clay and Adams soon found themselves in substantial agreement in favoring the enlargement of the activities of the national government; and hence, in order to distinguish themselves from other groups, they began, about 1824, to assume the name National-Republicans. They strongly advocated and supported the establishment of the second Bank of the United States, a high protective tariff for the benefit of agricultural and manufacturing interests, and an elaborate system of internal improvements constructed at national expense. The success of this combination in electing John Quincy Adams in 1824 inevitably led the supporters of rival candidates to amalgamate under the leadership of one of the most forceful, picturesque, and dominant personalities in all our polit-

National-
Republi-
cans

ical history, Andrew Jackson;¹ and in order to distinguish their views from the nationalistic tendencies of the Clay and Adams men and to appear to be true followers of Jefferson, they assumed the name Democratic-Republicans. With the name soon abbreviated to Democrat, this party became the immediate ancestor of the present Democratic party. It was successful in elevating its leader to the presidency in 1828, reëlecting him in 1832, and electing his chosen successor, Van Buren, in 1836. During these three administrations the National-Republicans had much to say in criticism of the "high-handed," "domineering" and "autocratic" methods of the president; and they liked to represent themselves as the champions of the constitutional rights of the legislative branch of the government against the encroachment of the executive tyrant, "King Andrew." Hence, there was a certain appropriateness in their assumption, about 1832, of the name Whig, imported from England, where a party designated by that term had long been the champion of parliamentary privilege against arbitrary assertions of royal prerogative.²

CHAP.
XXXIIDemo-
cratic-Re-
publicans

Whigs

During this transitional period appeared the Anti-Masonic party in 1826—the first formidable "third-party" movement. Short-lived as the party was, it made one permanent contribution to our national party system, *i.e.*, the national convention as a means of nominating candidates for the presidency and vice-presidency. The first such convention was held by the Anti-Masons in 1831, in preparation for the campaign of 1832.³

Anti-
Masonic
party

The fourth period of party history, *i.e.*, 1832-1860, might as appropriately be called the period of Democratic supremacy as the period of Democratic and Whig rivalry; for, with two brief interruptions, the Democrats were in continuous control of the national government. This long lease of power is to be explained largely by the greater homogeneity of the Democratic party, by its superior organization, and by the skill of its leaders in harmonizing internal differences, especially those growing out of the slavery controversy. Apart, however, from advocacy of territorial expansion and a strict construction of the constitution, its platforms consisted chiefly of negations—opposition to a national bank, to a protective tariff,

4. Demo-
cratic and
Whig
rivalry
(1832-
1860)

¹ A. D. Morse, "The Political Influence of Andrew Jackson," *Polit. Sci. Quar.*, I, 153-162 (June, 1886).

² E. M. Carroll, *Origins of the Whig Party* (Durham, N. C., 1925).

³ C. McCarthy, "The Anti-Masonic Party," *Amer. Hist. Assoc. Report* (1902), I, 365-574.

CHAP.
XXXIILack of
unity in the
Whig party

and to a general system of internal improvements by the national government. The Whig party, on the other hand, was composed of such diverse, not to say heterogeneous, elements—former National-Republicans, Anti-Masons, Nullifiers, and “Anti-Jackson” men—that it seldom presented a united front or placed before the voters a coherent and forward-looking program. Its chief successes in Congress were largely due to the brilliant personal qualities of such leaders as Henry Clay and Daniel Webster, and later, William H. Seward and Edward Everett; while in presidential elections it owed its two victories almost entirely to its ability to capitalize for campaign purposes the military popularity of William Henry Harrison in 1840 and Zachary Taylor in 1848. Attempting the same thing a third time, in the nomination of Winfield Scott in 1852, the party sustained a crushing defeat from which it never recovered. It showed a few signs of life in the next election, but after 1856 it was never a factor in national politics. Its rapid dissolution after 1850 was hastened by a hopeless division within its own ranks over the question of slavery in the territories, and especially by the contemporaneous appearance of a new third party called the Native-American, or Know Nothing, party,¹ which drew away both the northern and southern Whigs and, in the end, served as a bridge over which most northern Whigs passed into the new Republican party between 1856 and 1860.

Major
party
issues
after
1832

After the defeat of the movement to recharter the second Bank of the United States, which was the principal issue in the election of 1832, the chief party questions for two or three decades were the tariff, the annexation of Texas, and the status of slavery in the territories, together with a whole group of problems subsidiary to the slavery issue. Within the ranks of both the Whig and Democratic parties were men of all sections holding all sorts of views on the great sectional controversy. Consequently, these parties were for many years extremely reluctant to take any positive or aggressive stand on the slavery question, fearing to alienate powerful groups within their membership. Their leaders repeatedly sought refuge in compromises over legislative measures and in evasive platform declarations. Thereby, they postponed for at least a decade or

¹ On the career of the Know Nothing party, see J. B. McMaster, *With the Fathers* (New York, 1902), 87-106, and “The Riotous Career of the Know Nothings,” *Forum*, XIV, 524-536 (July, 1894); J. F. Rhodes, *History of the United States since the Compromise of 1850* (New York, 1893-1906), II, Chap. VII; T. C. Smith, *Parties and Slavery, 1850-1859* (New York, 1906), Chap. x.

two the open rupture between the North and South which finally resulted in the Civil War.¹

By 1848 the question of slavery in the territories had become the overshadowing issue in national politics. Thousands of anti-slavery men who had pinned their faith to the ability of the old parties to prevent the extension of slavery were convinced by the territorial acquisitions following the Mexican War of the incompetence of those parties and of the need of a new party, based upon open and definite opposition to the extension of slavery, and pledged to use all the powers of the national government to prevent slavery from taking root in the national territories. Hence, in the year mentioned, "Conscience" Whigs, "Barnburner" Democrats, and Liberty-party men effected a fusion which took the name of Free Soil party. The cardinal principles of this party were non-interference with slavery in the states where it was already established by law, but prevention of any increase of the number of slave states, and full exercise of all the power of the national government to prevent the existence of slavery in any place subject to national jurisdiction. With ex-President Van Buren as its candidate, the new party drew enough votes from Lewis Cass, the Democratic nominee, to enable General Taylor to carry New York and win the election. During the next four years, however, a reaction set in, especially after the compromise measures of 1850; so that the Free Soil vote fell off considerably in 1852.²

Before the election of 1860 came around, the repeal of the Missouri Compromise prohibition of slavery, in the act organizing territorial governments in Kansas and Nebraska in 1854, convinced hundreds of thousands of Whigs and Democrats that the day of compromises on the question of slavery had passed, and that the aggressions of the "slave power" could be stopped only by placing in control of the national government men pledged to the principles of the Free Soil party. The contemporaneous Native-American movement in national politics and the "Maine liquor-law," or prohibition, agitation in state politics had done much to dissolve old party ties; while northern indignation over the repeal of the Missouri Compromise completed the break-up of the Whig party in the North and rent the opposing party into Nebraska and Anti-Nebraska Democrats. The situation was thus ripe for the fusion of

CHAP.
XXXII

Free Soil
party

Origin of
the Repub-
lican party

¹ A. Johnson, "The Nationalizing Influence of Party," *Yale Rev.*, XV, 283-292 (Nov., 1906).

² T. C. Smith, *Liberty and Free Soil Parties in the Northwest* (New York, 1897).

all these anti-slavery elements—Liberty-party men, Free Soilers, Anti-slavery Know Nothings, and Anti-Nebraska Democrats—into a new organization under a new name. This was the genesis, between 1854 and 1856, of the present Republican party,¹ which has the distinction of being the only third party in American history that has succeeded in winning enough supporters to give it control of the national government.

5. Repub-
lican
supremacy
(1860-
1884)

The Union
party

When the Republicans won their first national victory in 1860,² the party was still heterogeneous and ill-compacted; on only one fundamental principle were the various elements in hearty agreement, namely, uncompromising opposition to the farther extension of slavery. The outbreak of the Civil War resulted almost immediately in the disappearance of party lines. Loyal Democrats supported all the war measures of President Lincoln's administration and furnished their share of officers and men in the Union army; many of them came temporarily, others permanently, into the Republican party. In recognition of this fusion, and to emphasize the fact that the war was being waged to save the Union and not to enforce a distinctively Republican policy concerning slavery, the name Republican was soon dropped and that of Union party was substituted. In reality, a new party came into being with a new purpose and a distinctive policy. The national convention which renominated President Lincoln in 1864 was neither thought of nor spoken of by its members as a Republican convention, but as the convention of a different party, the Union party, whose great objective was the preservation of the Union regardless of the fate of slavery. After the war was over, however, this party quickly disintegrated into radical and conservative factions, which, speaking broadly, coincided with the original Republican and Democratic elements. The conservatives withdrew in large numbers during the exciting congressional campaign of 1866,³ leaving the Republican radicals in control of the Union party organization. Hence, the national convention which nominated General Grant in 1868, while posing as a Union party assemblage, re-introduced the name Republican (calling itself the convention of the National Union Republican party); and by 1872 the former Democrats had so completely left the party that the name Union was

Re-birth
of the Re-
publican
party

¹G. S. P. Kleeburg, *The Formation of the Republican Party* (New York, 1911).

²E. D. Fite, *The Presidential Campaign of 1860* (New York, 1911).

³W. A. Dunning, *Reconstruction: Political and Economic* (New York, 1907), Chap. v.

dropped altogether. Manifestly there is some exaggeration in the claim often put forward by Republican orators and historians that their party won the Civil War and has enjoyed unbroken continuity since it was first organized at Jackson, Michigan, in 1854.¹

CHAP.
XXXII

During the late sixties and the decade of the seventies, the currency issue made its first appearance in national politics, in the form of a movement for the retention of the "greenbacks" issued during the Civil War, for an increase of the amount in circulation, and for recognition of the authority of the national government to make them legal tender for the payment of debts in time of peace.² Three times—in 1876, 1880, and 1884—the Greenback party placed a presidential ticket in the field, polling, however, a maximum popular vote only slightly in excess of 300,000 in 1880.

Greenback
movement

The presidential campaign of 1872 was distinguished by the appearance of two other third parties, namely, the Liberal Republicans and the Prohibition party. The former were strongly opposed to the reelection of General Grant, and favored a general lowering of the tariff, civil service reform, and a policy of amnesty toward the South. Their presidential candidate, Horace Greeley, was endorsed by the Democratic party, and polled upwards of three million popular votes, carrying seven states and winning sixty-six electoral votes.³ While the Liberal Republican party almost immediately died out, the Prohibition party has been the longest-lived of all our minor or third parties: it has put a presidential ticket in the field in every presidential campaign from 1872 onwards—without, it must be added, ever winning a single presidential elector or receiving a popular vote in excess of 275,000.

Liberal
Republican
and
Prohibition
parties

The old sectional issues connected with the Civil War and Reconstruction occupied the foreground until after the election of 1876. But in the decade following, new issues, primarily of an economic nature, steadily forced their way to the front. At the same time, the traditional differences between the major parties over tariff legislation tended to diminish. Although the Liberal Republicans in 1872, had demanded a material reduction of im-

¹ W. A. Dunning, "The Second Birth of the Republican Party," *Amer. Hist. Rev.*, XVI, 56-63 (Oct., 1910).

² In the last of the Legal Tender Cases, *Juilliard v. Greenman*, 110 U. S., 421 (1884), the Supreme Court upheld the main contention of the Greenback party. After this the party quickly disappeared. See A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, II, 322-324.

³ E. D. Ross, *The Liberal Republican Movement* (New York, 1919).

port duties, the Republican party in general became increasingly identified with the maintenance of a high protective tariff; and at the same time the Democratic party showed a growing disinclination to make a "tariff for revenue only," and still less a free trade policy, a sharply drawn issue in a presidential campaign. Aside from certain Democratic platform declarations about the "unconstitutionality" of a protective tariff, the difference between the two leading parties on this subject has steadily tended to become merely one concerning the degree of protection to be given different sections and industries.

The last period of party history is not inappropriately called the period of Republican and Democratic rivalry, for the two parties have contended for control of the national and state governments on more nearly equal terms than previously. During sixteen years of this time the Democrats have been in power in the White House, and often in one or both branches of Congress as well; during the remaining twenty-seven years the Republicans have been in similar control.

The most outstanding event in the history of the major parties in this period is the temporary disruption of the Republican party, and the resulting formation of the National Progressive party, in 1912. For upwards of five years preceding that upheaval, there had been two more or less antagonistic groups within the Republican ranks. One element, composed largely of the younger generation of party leaders, and called at first the "insurgents" and later the "progressives," wished to commit the party to a lowering of tariff duties and to new policies of social and industrial welfare legislation and increased governmental regulation of big business enterprises. This group also favored the newer instruments or devices of democracy such as the direct primary, popular election of senators, the initiative, the referendum, and the recall.¹ To all of these things the older party leaders—the "standpatters" or "reactionaries," as the progressives called them—were strongly opposed. President Taft's administration, which fell at this juncture, failed to smooth out these differences; on the contrary, it did much to accentuate them. In endeavoring to bring about the renomination of ex-President Roosevelt on a "progressive" platform in 1912, the reform elements encountered bitter opposition

¹J. P. Dolliver, "The Forward Movement in the Republican Party," (*utlook*, XCVI, 161-172 (Sept. 24, 1910); F. A. Ogg, *National Progress, 1907-1917*, Chaps. x-xi,

from the old-line leaders, who did not hesitate, both before and during the sessions of the Republican national convention, to avail themselves of every possible technicality and to resort to dubious rulings to bring about the renomination of President Taft and thus defeat the progressive plans. After one of the longest and most bitterly fought of convention contests, the Roosevelt forces were beaten by sheer force of numbers, and President Taft received the formal Republican nomination.¹

CHAP.
XXXII

The great majority of progressive Republicans throughout the country now indicated their approval of the proposal to form a new party; and accordingly, in August, the National Progressive convention was held in Chicago for that purpose. Amidst almost unparalleled enthusiasm, the assemblage adopted a long, specific, and forward-looking program of political, social, and economic reforms, and nominated Roosevelt for the presidency and Hiram Johnson, of California, for the vice-presidency. In the election that followed, Roosevelt received over four million popular votes and eighty-eight electoral votes, while the regular Republican nominee received almost three-quarters of a million fewer popular votes and only eight electoral votes. This Republican debacle enabled Woodrow Wilson, the Democratic nominee, to win, although his popular vote fell more than a million short of the combined Progressive and Republican vote. During the next four years the National Progressive party gradually disintegrated, most of its membership being reabsorbed by the Republican party; and in 1916 it put no presidential candidate in the field. Short-lived as it was, however, the party left a deep impress on both national and state legislation; and the full effect of the movement upon the history of the country cannot now, even after the lapse of nearly two decades, be fully appraised.

The
National
Progressive
party

So far as issues between the major parties are concerned, the period under consideration has been marked by the complete disappearance of the old problems connected with the Civil War and Reconstruction. The importance of the tariff as a real party issue has steadily dwindled. During the nineties, a new currency question, taking the form of the free silver agitation, overshadowed all other questions. About the same time, however, questions pertaining to the control of railroads and the curbing of monopolies or trusts were pressing to the front, and after the subsidence of the free silver movement, these continued to be subjects upon which

Major-
party
issues
since 1900

¹ See p. 215.

the two leading parties divided, although even here the differences were not apt to reach to fundamentals. Following the free silver campaign of 1896, an unsuccessful effort was made by the Democratic party in 1900 to convince the electorate that, by the retention of Porto Rico and the Philippine Islands, the Republicans were committing the country to a policy of "imperialism" wholly inconsistent with American traditions. Since the opening of the present century, further regulation of interstate commerce, the reorganization of the country's banking system, the conservation of natural resources, the improvement of industrial and living conditions for the wage-earning classes, and measures for the benefit of the agricultural interests of the nation have received much attention in national party platforms; but these matters again have not developed any fundamental cleavage between the two parties. Likewise, there have been sharp differences of party opinion as to what our foreign policy ought to be, particularly with respect to Mexico, the European nations involved in the World War, and the League of Nations. On the whole, however, major-party platforms in recent years have presented few clear-cut and sharply defined issues of importance or strongly opposed doctrines or tendencies of thought. Both parties have urged important changes in our national policies, but they have usually differed in detail and degree rather than in fundamental principles. With many voters, indeed, the main questions in recent presidential elections have been these: How far do I wish to go in making changes? To which group of leaders do I prefer to entrust the task of shaping our governmental policy and making our laws? Which party seems likely to give the country the more efficient and economical administration?

Recent
minor
parties:

Undoubtedly this disappearance of fundamental differences between the major parties has had much to do with the rise since 1890 of three or four minor parties holding comparatively radical views, especially the People's (or Populist) party and the more recent Socialist party. The Populist party developed in the early nineties out of the Farmers' Alliances as an organ of protest against existing economic and political conditions, especially in the agricultural regions of the South and West.¹ Assailing both of the old parties for their intimate relations with railroad, banking,

¹ F. E. Haynes, "The New Sectionalism," *Quar. Jour. Econ.*, X, 269-295 (Apr., 1896); F. L. McVey, "The Populist Movement," *Amer. Econ. Assoc. Studies*, I, No. 3 (1896).

and other capitalistic interests of the East—a relationship in which the Populists thought they saw a conspiracy against the welfare of the agricultural classes—the Populists advocated government ownership and operation of railroads and of telephones and telegraphs, postal savings banks, graduated income taxes, and the substitution of national paper money, or greenbacks, for bank notes; and they laid special stress on the necessity for free and unlimited coinage of silver at the ratio of sixteen to one. As remedies for the more distinctively political evils of the day, they urged the popular election of United States senators, the adoption of the initiative and referendum, and the enfranchisement of women. It is hard for one to realize today how extremely radical these policies seemed to the conservative classes of the nineties; to characterize a proposed innovation in the realm of economics or politics as “populistic” was to attach to it a worse stigma than has been conveyed by the term “socialistic” in more recent years. With the adoption of the free silver program by the Democrats in 1896, Populist strength melted away, and the party never again influenced a presidential election after 1892.

The present Socialist party¹ was organized about 1897 and, with the exception of the Progressive parties in 1912 and 1924, has been the most important of “third” parties in the past quarter of a century. The distinctive politico-economic program of the Socialists calls for “the collective ownership and democratic management” of railroads, telephones and telegraphs, express, steamboat, and other transportation services, and of all large-scale industries; also government ownership of mines, quarries, oil wells, forests, and water power. The social and industrial legislation which is favored differs but slightly from that advocated by the two major parties; and the same is true of many points in the political program, although there are other features, such as the demand for the abolition of the United States Senate, of the veto power of the president, and of the power of the Supreme Court to declare laws unconstitutional, and the demand for direct popular election of president, vice-president, and judges of the federal courts, which find neither standing nor sympathy in more conservative circles. Thus far, the Socialist party has never polled a million popular votes, although twice (in 1912 and 1920) it has closely approached

CHAP. XXXII

1. People's, or Populist, party

2. Socialist party

¹ There is also a more radical Socialist-Labor party which has had a presidential ticket in the field in recent campaigns, but its popular vote has always fallen short of 50,000. See M. Hillquit, *History of Socialism in the United States* (New York, 1910).

that number; nor has it won a single electoral vote in a presidential election.¹ Its only successes in the field of national politics have been the election of a single congressman three or four different times since 1910. In state legislatures, and especially in municipal politics, on the other hand, it has made a much better showing, having elected mayors in such cities as Milwaukee, Schenectady, and Minneapolis.²

Between 1916 and 1920 several movements were launched by radical or "liberal" groups for the organization of a new party with more distinctive principles and policies than those of either of the present major parties. One of these movements originated among radical leaders of organized labor, and had in view the creation of an independent labor party, analogous to the powerful British Labor party. Although the plan encountered much open opposition, even denunciation, from conservative labor leaders, an organization was effected, and a national convention was held in Chicago in July, 1920. In the meantime, another organization of persons who liked to call themselves "liberals," under the title of "Committee of Forty-Eight," had been actively at work trying to bring about a fusion of all voters who for any reason were dissatisfied with the programs, policies, or leadership of the major parties. Their national convention met in Chicago concurrently with that of the Independent Labor party; and, after prolonged negotiations, a sort of fusion of the two groups was effected under the title, Farmer-Labor party, a name which it was hoped would appeal strongly not only to the industrial classes in cities but also to the agricultural sections, especially those in which the Non-Partisan League movement³ had acquired great strength in the few years preceding. The platform of the new party embodied an attempt to combine the divergent views of the "intellectuals" who made up the Committee of Forty-Eight and the radical labor group. The result, however, was disappointing to the authors of the project, for the presidential candidate of the party in 1920, P. P.

¹ In 1924 the Socialist party united with the new Progressive party in supporting Senator La Follette for the presidency.

² For the history of the Socialist party since the World War, see G. S. Watkins, "The Present Status of Socialism in the United States," *Atlantic Monthly*, CXXIV, 821-830 (1919); "Revolutionary Communism in the United States," *Amer. Polit. Sci. Rev.*, XIV, 14-33 (1920); J. Oneal, "Changing Fortunes of American Socialism," *Curr. Hist.*, XX, 92-97 (Apr., 1924); D. Karsner, "The Passing of the Socialist Party," *ibid.*, XX, 402-408 (June, 1924); W. J. Ghent, "Collapse of Socialism in the United States," *ibid.*, XXIV, 242-246 (May, 1926).

³ F. E. Haynes, *Social Politics in the United States*, Chap. XIII.

Christensen, of Utah, received a total popular vote of less than three hundred thousand.

CHAP.
XXXII

The presidential campaign of 1924 witnessed another, and rather more successful, attempt to fuse the various groups dissatisfied with the conservatism of both major parties—Farmer-Labor men, leaders of influential labor organizations, members of the Committee of Forty-Eight, and representatives of the National Non-Partisan League. To these should be added prominent Socialists who, seeing their own party rapidly disintegrating, felt that the only possibility of attaining the ends for which the Socialist party had striven lay in uniting with this new “radical” movement, instead of nominating an independent presidential ticket. The crucible in which these elements were fused—at all events temporarily amalgamated—was the Conference for Progressive Political Action, under whose auspices a national convention was held at Cleveland, in July, 1924; and it was this gathering that nominated, or “endorsed,” Senator Robert M. La Follette, of Wisconsin, for the presidency. To him was later joined Senator Burton K. Wheeler, of Montana, as candidate for the vice-presidency. The new party, soon assuming the name Progressive, adopted a very specific “program of public service,” in which it attacked monopolies, called for government ownership of waterpower and railroads, and advocated a reorganization of the national banking and taxation systems. The most distinctive feature of the platform and campaign, however, was an attack upon the federal courts, and the demand for a constitutional amendment empowering Congress to override a decision of the Supreme Court declaring legislative acts unconstitutional. In the election the party’s candidates polled slightly over 4,800,000 popular votes,¹ but carried the electoral vote of only one state, Wisconsin.

La Follette
Progressive
party

Up to this point attention has been fixed upon the history of national parties, including some of the principal public questions upon which parties have divided at different periods. Something remains to be said of the organization or machinery by which national parties in recent years have attained, or sought to attain, their chief objective, namely, control of the government through winning elections and holding public offices. In the case of the

National
party
organiza-
tion

¹ This was approximately 16.6 per cent of the total popular vote; see p. 611. The campaign of 1924 is well summarized in *Polit. Sci. Quar.*, Supplement, XL, 35-59 (Mar., 1925).

major parties, this machinery has consisted, since about 1840, of two series of committees. One series confines its activities almost wholly to the election of the president, vice-president, senators, and representatives in Congress; and this part of the machinery alone will be spoken of in the present chapter. The other series attends to the same sort of work in connection with the election of state and local officers, and a description of it will be found in a chapter in Part IV of the complete edition of this book.¹ As a rule, national and state elections take place at the same time, however, so that during a presidential campaign the two sets of committees usually coöperate closely. At such times the policy of the national organization largely dominates state and local party machinery, and the activities of the former almost completely overshadow those of the state and local committees.

The
national
committee:

First in importance in the national party organization of the two major parties stands the national committee, of whose work in connection with the election of the president brief mention has already been made.² When the national committee first appeared, in 1848, as a part of the Democratic organization of that year, it was designed to serve merely as a temporary piece of party machinery. But since the Civil War its activity and influence have so increased that it is now an important political factor all of the time. The committee represents, in theory at least, the whole party constituency throughout the country. Its members are usually experienced practical politicians, keen observers of the trend of political sentiment in their respective states; and as occasions arise they usually find it possible in various ways to promote party harmony and efficiency. They are also not without considerable influence in the distribution of federal patronage falling to their states.

1. Compo-
sition

Until 1920, the Republican and Democratic national committees consisted of one member from each state, territory, dependency, and the District of Columbia. In that year the Democratic party doubled the size of its national committee by authorizing the election of one man and one woman from each state or other unit represented in the national convention;³ and four years later the Republicans followed their example. Until 1912, members of both Republican and Democratic national committees were "nominated" by the several delegations in the national convention and

¹ Chap. XLII.

² See pp. 213, 224.

³ The Panama Canal Zone also has representatives in the Democratic national committee.

formally "elected" by the entire convention.¹ The wide adoption of state direct primary laws has led to some modification of this practice, although, in theory, the national convention continues to elect; where state laws require the choice of national committeemen to be made in a party primary or in some other specified manner, the winning candidate is regarded as "nominated" to the national convention, and the convention proceeds to elect him to the national committee as a matter of course.

CHAP.
XXXII

The principal functions of the national committee are to decide upon the time and place of holding the national convention, to issue the formal call for the election of delegates, to make preliminary arrangements for the convention, to make up the temporary roll, and, after the convention adjourns, to select a national chairman (in consultation with the presidential candidate) and assist him in the detailed conduct of the campaign. Between presidential elections the committee usually falls into a state of suspended animation until the approach of the time for the next national convention, although in recent years permanent headquarters, in charge of a permanent staff, have been maintained continuously between presidential elections.

2. Functions

At the head of the national committee, and serving as commander-in-chief of the party's forces throughout the campaign, is the national chairman, nominally elected by the committee, but in reality the personal choice of the presidential candidate. To the chairman the committee transfers practically all responsibility, with full authority to manage the campaign in all its varied aspects.² It endeavors, however, to assist him in every possible way in the execution of the plans which he maps out. The other principal party officials consist of one or more vice-chairmen, elected by the national committee or appointed by its chairman, a secretary and an assistant secretary, and a treasurer. An executive committee is usually named by the national chairman, the members of which serve as his staff officers and advisers during the campaign. In 1924 the Democratic party got along without an executive committee; but the Republican committee consisted of the national chairman, three vice-chairmen (two men and a woman), the secretary and the treasurer of the national committee, and eight other men and six other women—making a total of

The
national
chairman
and other
officers

¹ For brief historical sketches of the Republican national committee, see G. S. P. Kleeberg, *Formation of the Republican Party*, 191 ff; *Official Report of the Republican National Convention*, 1912, pp. 443-447.

² H. Croly, *Marcus Alonzo Hanna* (New York, 1912), Chaps. xvi, xxi.

twenty members. The work carried on at the Republican national headquarters was handled by fourteen different bureaus, departments, or divisions, namely, a speakers' bureau, publicity department, purchasing department, advisory committee, congressional committee, foreign-language division, research division, commercial travelers' bureau, labor division, farm division, club division, and colored women, colored men, and colored speakers' divisions. The Democratic organization was far less elaborate and effective.

Comparatively inconspicuous in presidential campaigns, but prominently active in connection with congressional and senatorial elections occurring between presidential elections, are the congressional and senatorial committees which assist in the election of members of Congress bearing their respective party labels. The Republican congressional committee is composed of one congressman from each state having a Republican member in the House of Representatives, nominated by the state delegation and formally elected by a joint caucus of the Republican senators and representatives. The officers, consisting of a chairman, two vice-chairmen, a secretary, and a treasurer, as well as an executive committee of fifteen members, are elected by the general committee. The Democratic congressional committee consists of one member from each state. Usually he is a member of the House of Representatives, and if so, is selected by the delegation from that state. But if the state is without a Democratic representative, the committee chairman appoints some one, usually an ex-member, to represent it. The chairman is elected by the committee, and he appoints the other officers, an executive committee, and such further committees as may be needed. Since the adoption of popular election of senators, similar committees have been organized by both parties to assist in the election of party candidates for the Senate. Although these committees are reorganized every two years, the members are generally reëlected as long as they remain in Congress and are willing to serve, unless they are candidates for re-election, in which case they retire from the committee during that campaign.

Upon the opening of a presidential contest these congressional and senatorial committees place all their resources at the disposal of the national committee and become its close allies, foregoing much of their own initiative even in what concerns the election of senators and representatives. This is due to the fact that in "presidential years" practically all elections follow the fortunes

of the contest for the presidency. But in "off years" these committees are much more conspicuous. They then have entire charge of the congressional campaign, relying, of course, upon the cooperation of state and local committees. They distribute political literature, maintain bureaus of speakers, and raise and disburse money in considerable amounts, giving special attention to doubtful states or districts. They often intervene to smooth out local factional differences. In the interval between elections they keep in more or less close touch with the district and central committees in the different states, endeavoring in every possible way to strengthen the party organization.

CHAP.
XXXII

The main purpose behind the creation of our elaborate party organizations, whether national or state, is the same, namely, to instruct voters concerning the issues of the campaign, the policies and records of the rival parties, and the merits of candidates; to arouse the enthusiasm and quicken the loyalty of the rank and file; to win over those who have no definite or permanent party attachment; to make thorough canvasses of voters before election day in order to ascertain the drift of public sentiment; to see that new arrivals and first-voters are properly registered and to assist aliens in obtaining naturalization; to make sure that the maximum party vote is polled on election day; and finally, if the party wins, to see that party workers are rewarded with places on the public payroll, that legislation is enacted which will strengthen the hold of the party upon the voters, and that administrative policies are developed which, in one way or another, will reflect credit upon the party generally.

Purposes
of party
organiza-
tion

In seeking the accomplishment of these ends, party organizations make use of an astonishing variety of means and methods: mass meetings or "rallies;" parades, barbecues, and fireworks; paid and volunteer campaign speakers and glee-clubs; lawyers', merchants', workingmen's, and many other temporary clubs; organizations of colored voters, of Irish, Jewish, Italian, Scandinavian, Polish, German, and other foreign-born voters; leagues of college and university students; tons of campaign literature; and an immense amount of advertising in newspapers and magazines and upon billboards.

Campaign
methods

The efficient management and conduct of a presidential campaign necessitates the collection and disbursement of large sums of money; indeed, the first, and often the principal, task of some of the party committees mentioned above is to raise money, *i.e.*, a

Campaign
funds

"campaign fund." This task falls principally to the treasurer of the national committee, or is assigned to a director of finance and a committee on ways and means. Efforts to raise party funds in the last three or four presidential campaigns have consisted largely of appeals to the rank and file of the party in the hope of obtaining numerous small contributions in lieu of the fewer large subscriptions from wealthy individuals or corporations, which constituted the main sinews of party warfare before 1912. The new tactics have been designed to awaken a lively personal interest in the success of the party among people who have no mercenary interest in politics, and at the same time to free, so far as possible, the party leaders from any undue sense of obligation to donors of large amounts, especially those who might feel disposed to exact some political reward if their party won the election. In 1920 both major parties developed an organization for raising money more elaborate and far-reaching than in any previous campaign; and both closely modeled their machinery upon the Red Cross and Liberty Loan "drives" of the war period.¹

Recent
campaign
expendi-
tures

Prior to the campaign just mentioned, the maximum party expenditures in connection with a presidential contest appear to have been incurred in the "free silver" campaign of 1896. At that time, as the papers and accounts of the Republican national chairman² show, the Republicans raised and spent slightly less than \$3,500,000 to help elect President McKinley. No official records of national campaign expenditures were published until 1908. But since that date we have had something more substantial to rely upon than mere estimate or conjecture; for full publicity of both contributions and expenditures was rendered

¹In 1920 both pre-convention and national campaign expenditures were subjected to a searching investigation by the Kenyon committee, a sub-committee of the Senate committee on privileges and elections. A large amount of testimony was taken, which is published in two volumes (Washington, 1921). The conclusions of the committee are printed at the end of the second volume. See *Hearing . . . Pursuant to Senate Resolution 357* (1920), especially I, 1080 ff, 1187 ff, 1384 ff, 1387 ff, 1544 ff, 1572 ff; II, 2125 ff. A similar, though less sweeping, investigation was carried on in the campaign of 1924 by the Borah senatorial committee. The report of this committee gives a list of persons who contributed \$1,000 or more to the Democratic, Republican, and Progressive campaign funds that year (68th Cong., 2nd Sess., Senate Report No. 1100.)

The correctness of the amounts of expenditure, as given in the Kenyon and Borah reports, respectively, is challenged in J. K. Pollock, Jr., *Party Campaign Funds* (New York, 1926), Chap. III, and *ibid.*, "Report of the Borah Committee on Campaign Expenditures," *Amer. Polit. Sci. Rev.*, XIX, 560-562 (Aug., 1925).

²Marcus A. Hanna. See H. Croly, *Marcus Alonzo Hanna*, 218-220.

voluntarily in 1908, and since 1910 has been required by national law.¹ In the campaign of 1920 the aggregate expenditures of the national organizations of the major parties were as follows:

CHAP.
XXXII

	<i>Republican.</i>	<i>Democratic.²</i>
National committee	\$5,319,729	\$1,318,274
Congressional committee	375,969	24,498
Senatorial committee	326,980	6,675
Total	\$6,022,678	\$1,349,447

Vast as these sums may seem, they do not include the amounts expended by state and local party committees, or by private organizations, in the same campaigns. Nor do they include the pre-convention campaign expenditures by rival aspirants for presidential nomination. In 1920 these, too, surpassed all known previous records: Democratic aspirants spent the comparatively small sum of \$122,000, but among the Republicans, where the competition was far more spirited, the outlay totaled \$2,250,000. The aggregate of these disbursements in the national campaign of 1920—over ten million dollars—will probably remain the high-water mark for some years to come. At all events, there was a marked falling off in the expenses incurred by the two major parties in 1924.³ In that year, according to the report of the Borah senatorial committee, the Democratic national organization spent only about \$903,908;⁴ the Republican national organization expended about \$4,270,469. In the case of the Republicans, however, these figures include \$956,525 received by the national committee as the collecting agency for certain state party organizations and returned to those states; also \$250,000 disbursed by the national committee in payment of a loan, and the sum of \$257,500 paid to the congressional and senatorial committees.⁵ Making these

¹ *U. S. Compiled Statutes* (1918), pp. 31-34; *Code of the Laws of the U. S.* (1926), pp. 15-17.

² Both the Democratic and Republican national committees closed the campaign of 1920 with a large deficit. That of the Republicans amounted to about \$1,845,000; the Democratic deficit was considerably less.

³ The National Progressive expenditures were about \$221,977.

⁴ The Democratic congressional and senatorial committees had no separate funds in 1924, but their expenses were met by the national committee. The nature of the expenditures by national and state organizations in this campaign are set forth in detail in the Senate committee's report (68th Cong., 2nd Sess., Senate Report No. 1100).

⁵ According to the treasurer of the Republican national committee, the report of the Senate committee is in error in stating that the sum returned by the national committee to the state organizations was only \$573,999. The amount named in the text is what he asserts to be correct. The treasurer also states that the amount given above was substantially the total fund available to the congressional and senatorial committees.

deductions, the amount actually spent by the national committee was \$2,806,444.¹

The expenditure of these large sums, either to secure a presidential nomination or to enable a party to carry the election, has been regarded by many as fraught with sinister possibilities for our democratic institutions. The general public, uninformed as a rule concerning the legitimate cost of conducting a nation-wide campaign, or even a campaign in a single large and populous state, is prone to regard these amounts as presumptive evidence of an attempt to debauch the electorate. Rival party organizations, or candidates, with more restricted financial resources, regularly take advantage of this popular prejudice and loudly denounce the "slush funds" of their opponents. Yet any fair-minded citizen who will investigate the facts will find that it takes only a few items of a perfectly legitimate nature to aggregate a million dollars or more. The truth is, the "cost of living" for candidates and parties has mounted by leaps and bounds in the past decade or two, as it has for every one else. Like other forms of publicity or advertising, campaigning has come to be tremendously expensive. One reason is that the electorate has been more than doubled in recent years by the extension of suffrage to women; so that, allowing five cents for stationery, printing or typing, and postage, two and a half million dollars would be required merely to prepare and mail one circular letter addressed to all of our fifty million potential voters. A nation-wide campaign necessarily involves the expenditure of hundreds of thousands, if not millions, of dollars, in the aggregate, for the rental of headquarters and places for holding political meetings, for printing and distributing campaign literature, for the traveling expenses of speakers and the chief party officials, for a small army of clerks, copyists, typists, tabulators, and addressers, to say nothing of the cost of advertising in newspapers, in magazines, and upon billboards.² When all of these entirely legitimate objects of expenditure are duly weighed and footed up, it will not be hard to understand how, in spite of a

¹ This means that the national committee closed the campaign with a surplus of \$339,000. In December, 1924, the Republican national chairman announced a surplus of \$355,264. The difference between these two amounts is accounted for by the receipt of \$16,263 after November 25, the date when the committee's final report was filed with the clerk of the House.

² In 1920 the Republicans spent approximately \$160,000 for billboard advertising alone. For fuller discussion of campaign funds and expenditures, see P. O. Ray, *An Introduction to Political Parties and Practical Politics* (3d ed., 1924), Chap. xi, and J. K. Pollock, Jr., *Party Campaign Funds*, Chaps. iv-vi.

most searching investigation of expenditures in 1920 and again in 1924, practically no evidence has come to light justifying suspicion of wholesale corruption in those campaigns.

CHAP.
XXXII

Nevertheless, many people are strongly of the opinion that some thoroughgoing limitation upon national campaign expenditures ought to be established by law. Thus far, no satisfactory plan has been advanced. Many states have laws which restrict, in one way or another, the amount of money that may be expended in state campaigns, but Congress has passed only two or three measures upon the subject. An act of 1910 undertook to restrict to five thousand dollars the amount which a candidate for representative in Congress might spend in connection with his nomination and election, and, similarly, to ten thousand dollars the amount which a senatorial candidate might spend, exclusive of personal expenses, for travel, subsistence, stationery and postage, and a few other specified items. But the Supreme Court has held this law (to be more exact, this law as amended in 1911) to be unconstitutional in so far, at least, as it applies to expenditures connected with senatorial nominations.¹ Another law was passed in 1907 prohibiting contributions by any corporation to any campaign in connection with the election of president, vice-president, senators, and representatives, and also prohibiting corporations created under national law from contributing to any campaign whatsoever.² The latest congressional legislation relating to party finance took the form of a rider attached to the Postal Pay and Rate Act approved February 28, 1925. The provisions of this rider embody the main features of the corrupt practices act recommended by the Borah committee in its report upon the campaign of 1924. The new law limits the election expenditure of a candidate for the Senate to \$10,000 and that of a candidate for the House to \$2,500, unless state laws provide a lower maximum. As an alternative, however, an amount may be spent equal to that obtained by multiplying by three cents the total number of votes cast at the last general election for all candidates for the office which the candidate seeks, up to \$25,000 for a senatorial candidate and \$5,000 for a candidate for the House. The act also provides for a careful accounting by all political committees—national, state, and con-

The ques-
tion of
statutory
regulation

¹ *Newberry v. United States*, 256 U. S., 232 (1921). For summaries and criticisms of this decision, see *Polit. Sci. Quar.*, XXXVI, 472-476 (Sept., 1921); *Amer. Polit. Sci. Rev.*, XVI, 22-25 (Feb., 1922).

² *U. S. Compiled Statutes* (1918), pp. 31-34; *Code of the Laws of the U. S.* (1926), p. 16, § 251.

gressional—and for fines of \$10,000 and imprisonment for two years for violations.¹ Although actual abuses are less numerous and less flagrant in national elections than is rather widely supposed, the regulation of the use of money in connection with campaigns and elections is unquestionably one of the most important problems in the field of both national and state politics. Unfortunately, it is a problem for which no wholly satisfactory solution is in sight.

Although it is political parties that exert the most powerful influences upon the shaping of public policy, they are by no means the only effective agencies in this direction. Recent years have witnessed the appearance of a large number of non-political—at all events non-partisan—organizations which have set out to influence the enactment of laws or the determination of administrative policy. Sometimes they do this by direct action upon the governmental organ directly concerned, independently of political parties; at other times, by working through existing party organizations, endeavoring to commit one or all of them to the support of the measures which the non-partisan organization is advocating. In the field of national government and politics, the best known of such non-partisan organizations are the Anti-Saloon League, the Chamber of Commerce of the United States, the National Association of Manufacturers, the National Farm Bureau, the American Federation of Labor, and the League of Women Voters, formerly the National American Woman Suffrage Association.² So powerful have some of these organizations become that national parties, and national, state and local law-making bodies as well, give at least serious and respectful consideration to whatever measures of public policy they advocate.³

REFERENCES

- A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), I, 37-38, American Party; 49-50, Anti-Masonic Party; 565-580, Democratic Party; 721-725, Federalist Party; II, 52-53, Free Soil Party; 101, Greenback Party; 348, Liberty Party; 493, National Republicans; 757-758, Populist Party; III, 74, Progressive Party; 77-78, Prohibition Party; 189-201, Republican Party; 338-339, Socialist Party; 680-685, Whig Party.

¹The act does not apply to primary elections or nominating conventions. *Code of the Laws of the U. S.* (1926), pp. 15-17. See J. K. Pollock, Jr., *Party Campaign Funds*, Chap. VII.

²G. M. Martin, "The American Woman and Representative Government," *Atlantic Monthly*, CXXXV, 363-371 (Mar., 1925).

³C. E. Merriam, *The American Party System*, 222-225; E. M. Sait, *American Parties and Elections*, Chap. v.

POLITICAL PARTIES AND NATIONAL ELECTIONS 643

- J. A. Woodburn, *Political Parties and Party Problems* (rev. ed., New York, 1914), Chaps. I-IX. CHAP.
XXXII
- C. E. Merriam, *History of American Political Theories* (New York, 1903), Chaps. III-VII.
- , *American Political Ideas, 1865-1917* (New York, 1920), Chaps. X-XII.
- , *The American Party System* (New York, 1922).
- A. N. Holcombe, *The Political Parties of To-day* (New York, 1924).
- R. C. Brooks, *Political Parties and Electoral Problems* (New York, 1923).
- P. O. Ray, *An Introduction to Political Parties and Practical Politics* (3d ed., New York, 1924).
- E. E. Robinson, *Evolution of American Political Parties* (New York, 1924).
- E. M. Sait, *American Parties and Elections* (New York, 1927).
- H. R. Bruce, *American Parties and Politics* (New York, 1927).
- J. K. Pollock, Jr., *Party Campaign Funds* (New York, 1926).
- H. J. Ford, *The Rise and Growth of American Politics* (New York, 1898).
- E. Stanwood, *A History of the Presidency* (2 vols., Boston, 1906-1916).
- C. A. Beard, *Contemporary American History* (New York, 1913), Chaps. IV, VI-VIII, XII, XIII.
- G. Shuler, *Party Control in Politics and Government* (Brooklyn, 1923).
- W. W. Willoughby and L. Rogers, *Introduction to the Problem of Government* (Garden City, 1921), Chap. VII.
- V. B. Boothe, *The Political Party as a Social Force* (Philadelphia, 1923).
- F. J. Goodnow, *Politics and Administration* (New York, 1900).
- A. D. Morse, *Parties and Party Leaders* (Boston, 1923).
- W. Wilson, *Constitutional Government in the United States* (New York, 1908).
- G. S. P. Kleeberg, *The Formation of the Republican Party* (New York, 1911).
- T. C. Smith, *The Liberty and Free Soil Party in the Northwest* (New York, 1907).
- S. J. Buck, *The Agrarian Crusade* (New Haven, 1920).
- F. E. Haynes, *Third Party Movements Since the Civil War with Special Reference to Iowa* (Iowa City, 1916).
- , *Social Politics in the United States* (Boston, 1923).
- C. McCarthy, "The Anti-Masonic Party," *Report of American Historical Assoc.* (Washington; 1902), I.
- C. G. Bowers, *The Party Battles of the Jackson Period* (Boston, 1922).
- A. C. Cole, *The Whig Party in the South* (Washington, 1912).
- E. M. Carroll, *Origins of the Whig Party* (Durham, N. C., 1925).
- W. S. Myers, *The Republican Party; a History* (New York, 1928).
- F. R. Kent, *The Democratic Party; a History* (New York, 1928).

PART IV. STATE GOVERNMENT

CHAPTER XXXIII

IMPORTANCE AND COMMON FEATURES OF THE STATES

The states
as funda-
mental
units in
the Ameri-
can gov-
ernmental
system

The power, importance, and prestige of our national government must not be allowed to obscure the fact that practically every citizen of the United States is at the same time a citizen of some state and an inhabitant of a subdivision of a state called a county, and of some fraction of a county called variously a town or township, village, borough, or city. Indeed, no one can understand our federal system of government who is not fully acquainted with the intimate relations existing between the states and the national government; for "the state is the pivot around which the whole American political system revolves."¹ One must always remember that what we call our national government originally resulted from a union of *states*, and that today it rests as truly as ever upon a union of states; hence the significance and appropriateness of the name, the *United States* of America.

Furthermore, the states are the units upon which national political parties are organized; the states largely determine who may vote for representatives and senators in Congress, and for presidential electors; the states mark out the congressional districts from which representatives are sent to Congress, and also prescribe by law the regulations governing the nomination and election of senators, representatives, and presidential electors.² Whenever it becomes necessary for the House of Representatives to choose a president, the representatives vote by states, each state having a single vote. All proposed amendments to the national constitution require ratification by state action before they become effective. Finally, at one time or another the states have been employed as the agents of the national government for a great variety of purposes. For example, they have always performed an important function in recruiting our system of national defense, at least that part of it called the militia or national guard. More,

¹ See Chap. XI.

² J. Elliot, *Debates*, 78.

recently, as has been pointed out,¹ they have come to play conspicuous rôles as agents of the national government in the expenditure of federal appropriations in aid of various activities, notably, maternity and infant welfare work, the construction and maintenance of improved highways, and the advancement of higher education generally and of agricultural training in particular.

In spite of the fact that the states are thus absolutely essential to the successful operation of our national government, surprisingly few citizens know as much about state and local government and politics as about the national government and national politics; and so very few people really know anything about county government that the county has been aptly termed "the dark continent of American politics."² This is the more curious since our points of daily contact with these nearer and less well-known governments are vastly more numerous than our points of contact with the national government; for there is scarcely a period or an activity in the life-history of the average person born in the United States which is not in some measure, either directly or indirectly, touched, influenced, regulated, or controlled by state laws, or by local ordinances which derive their authority from state laws.

Thus, at birth and later in periods of illness, the citizen is attended by physicians and nurses whose qualifications and right to practice their professions have been determined under some state authorization; and when he dies, the burial permit and the undertaker's license are issued by some state or local officer. The elementary, secondary, and high schools in which the citizen and his children are educated are provided and supported under state authority; while, for higher general, professional, or technical education every state maintains at least one state college, university, or school of technology. When the period of schooling is over and the young citizen enters a trade, business, or profession, he is likely to find that state laws prescribe more or less minutely the conditions under which his occupation or profession may be carried on, and regulate the making and enforcing of contracts in the ordinary course of his business. If he marries and rears a family, he finds that the domestic relations, such as marriage and divorce and the relations of husband and wife, parent and child, guardian and ward, are regulated by state, rather than national, laws. Similarly,

CHAP.
XXXIII

The citizen in closer contact with state and local governments than with the national government

¹ See Chap. xxix.

² H. S. Gilbertson, *The County: the Dark Continent of American Politics* (New York, 1916).

the state determines the citizen's right to vote and to hold most public offices, and his right to acquire and hold property and bequeath it at his death. If at any time he becomes involved in a lawsuit, or is charged with some crime, his rights and liabilities in the one case and his guilt or innocence in the other will be determined, in the great majority of instances, by state and local, rather than by national, courts. The care of his poverty-stricken fellow citizens, the maintenance of institutions for the insane and the blind, and of reformatories and penitentiaries for the delinquent and criminal classes, are state, not national, activities. If he lives in a city or incorporated village or borough, the streets along which he moves to and from his daily work are usually laid out, paved, cleaned, lighted, and kept safe for traffic by the local authorities; and the same local authorities are commonly responsible for providing the inhabitants with an abundant supply of pure water and an adequate sewerage system, with fire and police protection, and with parks and other recreational facilities. Often, too, the local authorities have much to do with the regulation of such public utilities as gas, electricity, and transportation. And finally, whenever a citizen is prosperous enough to become a taxpayer, he quickly discovers that the greater part of his taxes, at any rate the taxes which affect him most directly, are the ones assessed, collected, and expended by state and local governing bodies.

Self-interest should impel to a close study of state and local government

Accordingly, it would seem that considerations of enlightened self-interest, if no others, ought to be sufficient to stimulate men and women to become familiar with the organization and workings of their state, county, and local governments, and to take an active part in the selection of the public officials who are charged with the carrying on of these governments. We feel the effects of corrupt or inefficient state and local government far more keenly than we feel the results of inefficiency and corruption in the national government.

Such study will assist in distinguishing true and false democratic institutions

A further stimulus to the study of state and local government should flow from a realization of the fact that a thorough understanding of the structure and actual operations of the state and local governments will enable a person more readily to distinguish between true and false democrats, between genuine and counterfeit democratic institutions and practices. And here in the United States today, we stand in peculiar need of being able to make these distinctions; for no one in our country shouts louder for

democracy and more persistently demands "government by the people" than the petty tyrants whom we call political bosses, and their camouflaged oligarchies which we denounce as political machines, and whose sordid and undemocratic manipulations of our governmental institutions we stigmatize as bossism or machine rule. Probably the most frequent and flagrant instances in which these false democrats, in the name of democracy, but with selfish and sinister purposes, have foisted upon the people institutions and practices which are essentially undemocratic, or have perverted to base uses institutions originally created for the promotion of democracy, are to be found in connection with our state, county, and city governments.

In order to be able to distinguish clearly between true and false democratic institutions and practices, the citizen should constantly bear in mind what the most essential features of genuinely democratic government are. These features, or characteristics, may be reduced to three; although each of them suggests some large questions which it will be our duty to consider. In the first place, the great majority of the adult population must have a voice in the selection of public officials, and through these officials must have a voice in the determination of public policy as expressed in national and state laws. As a nation, we have only recently achieved this essential of truly democratic government with the complete enfranchisement of women. If the electorate is to play a real, and not a sham, part in government, the duties imposed upon it must be such as can be performed intelligently and with a reasonable expenditure of time and effort. In determining these duties, due consideration must be given to the fact that the average citizen can devote only a very small part of his or her time to political activity or to acquiring information about candidates for public office. Is, therefore, genuinely democratic government more likely to be promoted by a "short ballot," which means the filling of only a few offices by popular election, or is it more likely to be promoted by multiplying the number of elective officers? Another question which suggests itself in this connection is whether voting is a duty or a privilege; and if a duty, whether it is right or expedient to compel every person to perform that duty.

The electorate in a genuinely democratic community must be able to express its will easily and clearly on election day, amid favorable surroundings, and must have that will fairly and accurately ascertained and recorded by honest and competent election

CHAP.
XXXIII

Character-
istics of
genuinely
democratic
govern-
ment:

1. Univer-
sal adult
suffrage,
few elec-
tive offices,
and
adequate
election
laws

officials. How do our ballot laws and registration, primary, and election laws meet this test? Lastly, does genuinely democratic government require that the electorate shall retain in its own hands the right to remove abruptly from office any public official who proves dishonest, incompetent, or otherwise unsatisfactory, and to elect a substitute for the unexpired term? In other words, does the recall of elective officers contribute to true democracy?

2. Effective legislative organs

The second essential of democratic government is that agencies be provided whereby the will of the voters, as expressed at an election upon broad questions of public policy, can be embodied in law with the least possible friction and delay. Many questions immediately suggest themselves when one attempts to apply this test to our state and local governments. Is a state legislature or a city council likely to serve the interests of democracy better if organized in one house or in two houses? Is the organization of our state legislatures, and are their methods of transacting business, adapted to carry out the public will promptly, or rather to defeat, or at least to side-track and delay, the popular will when it runs counter to the plans of bosses, machines, or special interests? Will true democratic government be promoted by giving to the electorate the last word in deciding what measures shall, and what ones shall not, become laws; in other words, is democratic government promoted by the adoption of the initiative and the referendum?

3. Easily located and enforced responsibility for the administration of laws

The third essential, and one which is quite as important as the other two, is suitable means for carrying into execution the public will as enacted into law by the state legislature or the city council, including means whereby, in event of the failure of such execution, the electorate may know exactly where to locate the responsibility. Real democratic government is not, despite what we have often been told, all a matter of the heart or merely a question of electing the best men to office. A good mechanic will, of course, get better results than a poor one, using the same defective tools; similarly, able and honest public officials will get better results than incapable and dishonest officials, operating the same clumsy and cumbersome governmental machinery. But in order to achieve the best results a democracy must provide its agents with the best possible instruments with which to work. Reform of governmental machinery ought, therefore, to go hand in hand with the election of good men to office. Are the executive and administrative organs of our state, county, and city governments so organized as to operate and

coöperate smoothly, efficiently, and economically in the public interest? Are our state courts as well organized as they should be? Do our methods of selecting and retiring judges work in the interest of democracy or otherwise? Do the prevailing methods of administering justice in civil cases make for the impartial determination of the rights of rich and poor, without undue delay, expense, or regard for mere technicalities? Do the prevailing methods of criminal procedure adequately protect the rights of the accused, and also the rights of the community? Is it essential that the judicial servants of the people have the right to declare null and void laws passed by the legislative servants of the people?

All of the foregoing questions, and doubtless many others, will present themselves to the conscientious citizen when he begins to apply the several tests of democratic government that have been mentioned. It is hoped that in the following chapters sufficient facts will be presented to enable the thoughtful reader to answer at least some of them to his reasonable satisfaction.

Before entering upon a detailed study, however, of our state and local governments, the fact should be brought out that, although the forty-eight state governments differ greatly one from another in details, they are organized, in general, on substantially the same lines, and hence correspond rather closely in their most conspicuous and important features. This will appear from a summary of the principal aspects which they have in common.

The United States is a union of states which are on a footing of legal equality one with another; and, so far as their representation in the Senate is concerned, they are on a footing of political equality as well. In other words, no rights or privileges are enjoyed by one state or group of states which do not at the same time appertain to all other states in the Union. This equality of the states is a fundamental principle of our constitutional system.¹

Although somewhat circumscribed by the express and implied limitations contained in the national constitution, the sphere of state activity is still far more extensive than that of the national government, and in that sphere each state is supreme; its powers are native and inherent, not delegated as are the powers of the national government.

¹ It constitutes no impairment of this legal equality for Congress to impose conditions with which the people of a territory must comply before their admission into the Union as a state. See above, pp. 142-143; C. K. Burdick, *The Law of the American Constitution*. 307-312.

Features
common to
all of the
states:

1. Legal
equality

2. Native
or inherent
powers

CHAP.
XXXIII3. A writ-
ten consti-
tution

Every state has a written constitution which determines the organs of state and local government, defines their respective powers and functions, and guarantees the fundamental civil rights of its citizens. This constitution is the fundamental organic law to which all state legislation and local ordinances or regulations must conform. A state is at liberty to put almost anything it sees fit into its constitution. But any provisions which conflict with the national constitution, or with acts of Congress or treaties of the United States, will be held by the courts, after proper legal proceedings, to be null and void.

4. A single
chief
executive

Every state has a single chief executive called the governor, who in all states except one is elected by direct popular vote; in Mississippi he is chosen by popular vote supplemented by action of the legislature. The state governorship has descended directly from the office of governor in the colonial period.

5. A repre-
sentative
legisla-
ture

Every state has a representative law-making body made up of persons chosen by direct vote of the electorate. This legislative body is usually called the general assembly. In New Hampshire and Massachusetts, however, it is known as the "general court," a name inherited from the time when the meeting of the general membership of the Massachusetts Bay Company, called the general court, was the only law-making body in the colony.

6. A bi-
cameral
legisla-
ture

The legislature in every state is a two-chambered, or bicameral, body, consisting of what are generally called a house of representatives and a senate. In the case of the original thirteen states, the bicameral legislature developed naturally out of usages which were prevalent in the colonial period. In the earliest colonial assemblies the governor and his council, both appointed in almost all of the colonies by the crown or by the proprietor, and therefore in no sense politically responsible to the colonists, sat with elected local representatives in the enacting of laws. Sooner or later, friction arose between the aristocratic and monarchical elements in the colony, represented by the governor and his council, and the more democratic elements comprising the mass of the inhabitants; and in every colony except Pennsylvania, Delaware, and Georgia, this resulted in a separation of the two groups of members. Each group continued to have a voice in the making of laws, but they henceforth sat apart. The assembly, or popular branch, became the prototype of our present house of representatives; the governor and council, acting in a legislative capacity, became the prototype of the modern state senate. With little or no real consideration of

the relative merits of single-chambered and double-chambered legislative bodies, practically all of the states which have come into existence since the Revolution have adopted the bicameral plan. The utility of the bicameral legislature as an instrument of democratic government is, however, now being vigorously challenged, and the question will be discussed in some detail in a later chapter.¹

In every state there is an elaborate system of courts for the administration of justice in civil and criminal cases, and for administering the estates of deceased persons. Everywhere the highest of these state courts, usually called the supreme court, exercises the right to declare null and void any act passed by the legislature of the state or any ordinance passed by a city council which contravenes a provision of the state constitution, the national constitution, an act of Congress, or a treaty of the United States.

Like the national government, all of our state governments are organized upon the theory that the powers of government fall into three great classes, executive, legislative and judicial; that each of these groups of powers should be assigned to, and exercised by, a single branch or department of the government; and that no department of government should exercise powers which have been assigned to either of the other departments. The idea is, in other words, that executive, legislative, and judicial functions should, in general, be confined in mutually exclusive compartments.

Hence it is that we find all of our state constitutions specifically recognizing the doctrine of separation of powers. The Illinois constitution of 1870, for example, declares that "the powers of the government of this state are divided into three distinct departments—the legislative, executive, and judicial; and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."² As might be inferred from the final clause of this article, it has not been found practicable in any of the states to make a strict application of the doctrine; by constitutional provision and by judicial construction, numerous specific exceptions to it have been made from time to time.

Unlike most of the other governmental features common to the several states, deliberate observance of the separation of powers

¹See Chap. xxxv.

²Art. III.

first appeared in our political system in the period of the Revolution; and from the end of the eighteenth century to the opening years of the twentieth, the principle was almost universally acclaimed as the corner-stone of American democracy, as the chief reason for the success of our national government, and as an absolutely indispensable feature of all our state governments and of all our municipal governments as well. At the present time, however, both political scientists and men of long experience in the practical affairs of state and city administration are vigorously challenging the doctrine as a mere shibboleth;¹ and the adoption of the commission form of government in more than seven hundred cities since 1900 attests the widespread belief today that separation of powers, while making for a certain negative kind of safety, is nevertheless unsound. The main reason why it is unsound, according to people who feel this way, is that it assumes that there are three primary or fundamental functions of government, whereas in fact there are only two, namely, the formulation of public policy by the legislative body and the execution of that policy by the executive and judicial branches. The theory is criticized, furthermore, for its failure to give due consideration to the natural and inevitable interdependence of departments of government and the necessity that they work in close coöperation; and it has frequently been pointed out that "everywhere else in the world the principle upon which constitutional government is founded is the connection of the powers, and not the separation of the powers, of the government."

Intimately connected with the principle of separation of powers is the system of checks and balances, which is also found in every state government. Each of the three branches is provided with certain means of defense against encroachments upon its proper sphere by either of the other two branches. Thus the executive department may check legislative encroachment through the exercise of the veto power by the governor; the judiciary has a check upon the legislature through its power to declare the acts of that body unconstitutional; and in turn the legislature, through its power to impeach and remove both administrative and judicial officers, and in some instances abolish courts, has a check upon the executive and judicial departments. The right of the senate to

¹H. J. Ford, "The Cause of Political Corruption," *Scribner's Mag.*, XLIX, 54-61 (Jan., 1911); W. F. Dodd, *State Government*, 75-85; J. M. Mathews, *American State Government*, 34-39.

confirm many of the governor's appointments is a further check upon the executive; and the latter has a certain check upon the courts through his power of pardon and reprieve. In addition, each branch of the legislature is balanced against the other, each having a veto upon the legislative acts of the other.

Lastly, every state is divided into local government areas called counties, except in Louisiana, where the name parish is used instead. These counties or parishes, in turn, contain towns or townships, villages, boroughs, cities, and a great variety of special districts. Thus it comes about that a vast majority of people live under at least four different governments, namely, the national government, a state government, a county government, and the government of one or more subdivisions of a county, such as a city, township, village, or borough; and it is with one or another of these varied subdivisions of a county that the native-born citizen, consciously or unconsciously, first comes into contact.¹

All of these local government areas (or political subdivisions, as they are called collectively) are created and endowed with powers by the state exclusively. Every state has complete authority to devise its own scheme of local government and may modify it at will from time to time; the national government has nothing to do with such matters. The inhabitants of all of these subdivisions enjoy more or less extensive rights of local self-government. None the less, the subdivisions are themselves creatures of the state constitution or state statutes; and, subject to a steadily increasing number of constitutional restrictions, the legislature may exercise almost unlimited authority over them, altering or abolishing their existing forms of government, and, if it chooses, depriving the inhabitants of practically all voice in their local affairs without consulting them. On the other hand, the legislature may grant them almost complete local self-government, or what is commonly called "home rule." Thus our forty-eight states become so many useful laboratories, or political experiment stations, in each of which may be tried out various public policies and different schemes of local government.

CHAP.
XXXIII

10. Subdivisions for purposes of local government

REFERENCES

- W. F. Dodd, *State Government* (New York, 1922), Chaps. I-III.
J. M. Mathews, *American State Government* (New York, 1924), Chap. I.
A. N. Holcombe, *State Government in the United States* (2nd ed., New York, 1926), Chaps. III-V.

¹ The government of these local divisions will be described in Part V.

- A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), III, 386.
- J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chap. XXXVI.
- E. Kimball, *State and Municipal Government in the United States* (Boston, 1922), Chap. I.
- H. G. James, *Local Government in the United States* (New York, 1921), Chap. II.
- A. N. Holcombe, "The States as Agents of the Nation," *Southwestern Polit. Sci. Quar.*, I, 307-327 (Mar., 1921).
- E. McClain, *Constitutional Law in the United States* (New York, 1905), Chaps. XXX, XXXI, XXXIII.
- C. F. Burdick, *The Law of the American Constitution* (New York, 1922), Chaps. XIX-XXII.
- W. A. Dunning, *Essays on the Civil War and Reconstruction* (New York, 1904), pp. 304-352, "Are the States Equal under the Constitution?"
- The Federalist* (Lodge ed.), Nos. XLV-XLVI.

CHAPTER XXXIV

STATE CONSTITUTIONS

Every state has a written constitution which forms the legal basis of its government, precisely as the constitution made at Philadelphia in 1787 forms the legal basis of the national government. Most of these forty-eight organic laws—even those in effect in the older states—date from comparatively recent times. But some of them have lasted through two or three generations, and a few are, to all intents and purposes, of Revolutionary origin. One of the signal contributions of the authors of American independence to political progress was, indeed, the drafting of written constitutions to serve as the basis for the new state governments.

Beginning with New Hampshire, eight colonies—in process of becoming states—adopted their first constitutions in 1776; and three others joined the list in the following year.¹ Connecticut and Rhode Island made only a few formal changes in their corporate charters, which thereafter served as state constitutions until 1818 and 1842, respectively. The people of Massachusetts went along under a provisional government until 1780, when their first and only state constitution was adopted. This instrument alone of the original series was formally submitted to a popular vote before taking effect. Furthermore, it alone, of the constitutions adopted before 1783, was framed by a convention of delegates specially chosen for the purpose;² the others were made by legislatures or irregular revolutionary assemblages. Constitution-making by bodies brought into existence for that sole purpose, however, soon became the rule; and every state constitution in force today originated in this manner.

The first
state
constitu-
tions

When, therefore, the national government was set up, first under

¹ See pp. 87-88; W. C. Morey, "The First State Constitutions," *Annals Amer. Acad. Polit. and Soc. Sci.*, IV, 201-232 (Sept., 1893); W. C. Webster, "Comparative Study of the State Constitutions of the American Revolution," *ibid.*, IX, 380-420 (May, 1897); A. Nevins, *The American States During and After the Revolution*, Chaps. iv-v.

² W. F. Dodd, "The First State Constitutional Conventions, 1776-1783," *Amer. Polit. Sci. Rev.*, II, 545-561 (Nov., 1908). The New Hampshire constitution of 1778, although drafted by a specially chosen convention, was rejected when submitted to popular vote in 1779.

CHAP.
XXXIV

A state's
power
over its
constitu-
tion

the Articles of Confederation and later under the constitution of 1787, every state had a written constitution; and, although it is nowhere formally required, every one of the thirty-five states subsequently admitted came into the Union similarly equipped. Every state has, of course, the right to make and alter its own constitution. But this is not an absolute right. The state is a political division of undefined, yet limited, powers, and it can no more transcend the restrictions placed upon it by the national constitution in making or amending its fundamental law than in doing anything else. For example, it cannot, in its constitution, authorize *ex post facto* legislation or the use of bills of attainder. Before a state is admitted to the Union, Congress scrutinizes its proposed constitution, and if anything objectionable is found, admission may be held up until a change is made; although, as we have seen, a political requirement imposed in this way may, after the state is once admitted, be practically nullified.¹ Every state determines for itself how its constitution, once in force, may be amended or replaced with a new one.

Length of
existing
constitu-
tions

Naturally, state constitutions vary considerably in contents, and therefore in length. But all of them are long documents; even the briefest ones run well beyond the national constitution in number of words, if not also in multiplication of provisions. The ten shortest instruments are those of New Hampshire (1792), Vermont (1793), Connecticut (1818), Rhode Island (1842), New Jersey (1844), Indiana (1851), Iowa (1857), Kansas (1859), Tennessee (1870), and North Carolina (1876). These vary from fourteen closely printed pages in the case of New Jersey to nineteen pages in the case of New Hampshire. With only two exceptions, all were adopted before the Civil War. The ten longest constitutions are those of Maryland (1867), Missouri (1875), Colorado (1876), Georgia (1877), California (1879), South Dakota (1889), Alabama (1901), Virginia (1902), Oklahoma (1907), and Louisiana (1921). The shortest of this group is the constitution of South Dakota, which covers thirty-eight pages; the longest is that of Louisiana, which runs through almost ninety pages; the majority fill between forty and fifty pages. It will be noted that all were adopted since the Civil War, and four since 1900.

As these facts indicate, state constitutions have steadily grown longer, the country over, in recent decades, and especially in the past fifteen or twenty years; new ones have been made exception-

¹ This happened in the case of Arizona in 1912. See p. 142.

ally lengthy at the outset, and older ones have been lengthened out by process of amendment. What has happened is that a large number of subjects which formerly were either ignored or left to be dealt with by the legislature at its discretion have been incorporated in the constitution, sometimes occupying several paragraphs or even articles. Thus we now have elaborate provisions for the control of railways, banks, and other corporations; sections authorizing the enactment of workingmen's compensation and other laws for the benefit of the wage-earning classes; provisions prompted by the changed position of women in modern society; paragraphs dealing with the special problems created by the rise of great cities; and articles making detailed provision for popular education.¹

CHAP.
XXXIV

Reasons for
increased
length

No one needs to be told that by nature these are matters for legislative rather than constitutional regulation. Why have they been brought into the constitutions at all? The first reason is to be found in a desire to overcome, or to obviate, the effects of judicial decisions in the realm of social and industrial regulation. For example, a decision of the New York court of appeals in 1911 declaring a workingmen's compensation law unconstitutional led shortly to the adoption in that state of a constitutional amendment definitely conferring power on the legislature to enact such a law. Similar decisions holding invalid some exercise of power by the legislature or by other branches of the state government have resulted in amplification in many states. In the second place, additions have been made with a view to authorizing the legislature or the executive departments to do certain things—perhaps to engage in non-governmental activities—for which there seemed to be no clear basis in the existing constitution. In the third place, there has been a marked tendency on the part of constitutional conventions to incorporate in the constitutions prepared by them bodies of regulations which have already been in successful operation in their states on a legislative basis. Thus in the Illinois constitution of 1848 were incorporated the detailed provisions relating to the organization of the inferior state courts which had been enacted by the legislature under the previous constitution. Again, whenever a

¹The Oklahoma constitution (1907) deals in great detail with a wide variety of subjects that might well be left to legislative discretion. For example, Article 13, on education, makes it the duty of the legislature to provide for a "uniform system of text-books in the common schools," and for the teaching therein of "the elements of agriculture, stock-feeding, and domestic science."

constitutional convention first assembles, most of its members may be favorable to a short constitution dealing only with fundamentals; but it is soon discovered that each is in favor of detailed provisions upon matters in which he is specially interested or which he feels to be of fundamental importance. As a result, the convention usually ends with a new constitution longer than the old one. Furthermore, the more elaborate and detailed a constitution grows, the more frequently do new amendments become necessary; every new condition or unforeseen contingency tends to require a change, not simply statutory, but also constitutional.¹

Distrust of
legislatures

But the main explanation of our lengthy constitutions is yet to be mentioned, namely, the widespread distrust of state legislatures growing out of the abuses of legislative power, accompanied by much corruption, which marked the middle portion of the past century. With a view to averting these evils, later constitution-makers have drawn up long lists of specific restrictions upon the action of the legislature² and, by the detailed treatment of many subjects in the constitution itself, have placed these matters beyond the reach of tinkering legislators. Confronted with the very practical problems of checking and preventing legislative abuses and corruption, constitution-framers have shown scant regard for the theoretical distinction between legislative and constitutional subjects and functions; and they will probably continue to do so until they have the courage to inaugurate such a reorganization of the state legislatures as will render constitutional restrictions largely unnecessary. Legislative reorganization, in other words, is a prerequisite in most states to a shorter constitution dealing only with fundamentals.

Why
shorter
constitu-
tions are
desirable

Simplifying the state constitution by eliminating all but fundamental provisions relating to the organization and powers of government and the rights of citizens is not a matter of mere academic interest; it is a reform of great practical importance, and for at least three reasons. In the first place, inserting legislative matters in the constitution is a good deal like locking up one's last will and testament in a safe-deposit box and throwing away the key. It is a most effective means of preventing reconsideration, change, and reform. To the ordinary delays and difficulties of obtaining legis-

¹ Consequently, constitution-framers should provide a correspondingly easy method of amendment; but the concessions thus far made in the direction of an easier amending process have nowhere kept pace with the multiplication of constitutional provisions.

² These are discussed more fully in Chap. xxxvi.

lative action is added the necessity of securing a constitutional amendment, seldom an easy thing to do. In the second place, the mounting number of subjects placed beyond the reach of the legislature has been in no small measure responsible for the widespread popular criticism of the courts for declaring acts of the legislature unconstitutional. With shorter constitutions, fewer occasions would arise for the courts to overturn legislative enactments. Finally, from the expanded state constitution the courts have developed what is called the doctrine of implied or resulting limitations, which still further ties the hands of the legislature on many occasions when action is desired. According to this judicial doctrine, the mere fact that a subject has been placed in the constitution indicates an intention on the part of the constitution-makers to take that subject entirely out of the hands of the legislature, and therefore is an implied denial of the right of the legislature to deal with any phases of the subject unless there is some express authorization in the constitution itself. It should be added, however, that this doctrine does not obtain everywhere; in some states the courts have held that the legislature has all power not denied to it by the constitution.

State constitutions naturally deal with a great number of subjects. First of all, there is an outline of the general frame of government, with provision usually for the three familiar branches and always for the principal organs or agencies through which the state's authority is to be exercised. More extended provisions distribute power among these organs or agencies, and also between the state authorities, on the one hand, and local governmental units, such as counties and cities, on the other. Various leading activities, *e.g.*, taxation and finance, the regulation of banking, control of railroads and other public utilities, education, and different phases of industrial regulation, are likely to be dealt with in separate articles. There is usually, too, an article on suffrage and elections which, in addition to protecting the citizen from arrest and from military duty on election day, fixes the general and special qualifications for voting, and in a very general way regulates the conduct of elections. Another article stipulates the way or ways in which amendments may be proposed and adopted.

Finally, there is commonly an important, and often rather lengthy, article comprising a bill of rights. In the older constitutions this is apt to include a statement of political theories which were in vogue in the late eighteenth and early nineteenth centuries

—theories which in some instances are still generally adhered to but which in other cases have been relegated to the lumber-room of discarded doctrines. The newer constitutions either omit these theories altogether or present them in a revised, modernized form. More important, in any event, are the provisions relating to certain concrete fundamental rights of the citizen, such as religious freedom and freedom of speech and the press, the right to keep and bear arms and to be exempt from unlawful searches and seizures, the privilege of the writ of habeas corpus, and the right to bail and to trial by jury; also the clauses which prohibit *ex post facto* laws, laws impairing the obligation of contracts, cruel and unusual punishments, and the deprivation of life, liberty, or property without due process of law. Many of these stipulations merely duplicate, of course, the limitations imposed upon the national government by the first eight amendments to the national constitution, and likewise those imposed upon the states in Article I, section 10, of that instrument.¹

Important modifications of these ancient rights—especially the right of trial by jury and of indictment by grand jury—have been introduced in some of the more recent constitutions, notably that of Oklahoma; and new clauses have been inserted dealing with problems arising out of the remarkable growth of business corporations. Indeed, in view of the restrictions on the states contained in the first article of the national constitution and in that clause of the Fourteenth Amendment which prohibits the states from depriving any person of life, liberty, or property without due process of law, various provisions of the state bills of rights have become superfluous; and their retention often results in conflicting decisions of state and federal courts when interpreting duplicated clauses in the state and national constitutions. The state constitutions might well, therefore, be shortened by the excision of such clauses. It is difficult, however, to imagine a constitutional convention with the boldness and originality to propose the omission of any of the venerable guarantees; and they rarely fail to reappear in full array when a constitution is revised.

The alteration of a state constitution is everywhere a more difficult and roundabout process than the alteration or repeal of a statute. At the present time there are three principal methods of originating amendments to state constitutions, at least two being

Three
methods of
amending
constitu-
tions:

¹Pp. 173-174 above. See *Ill. Const. Conv. Bull.*, No. 15 (1920), "The Bills of Rights."

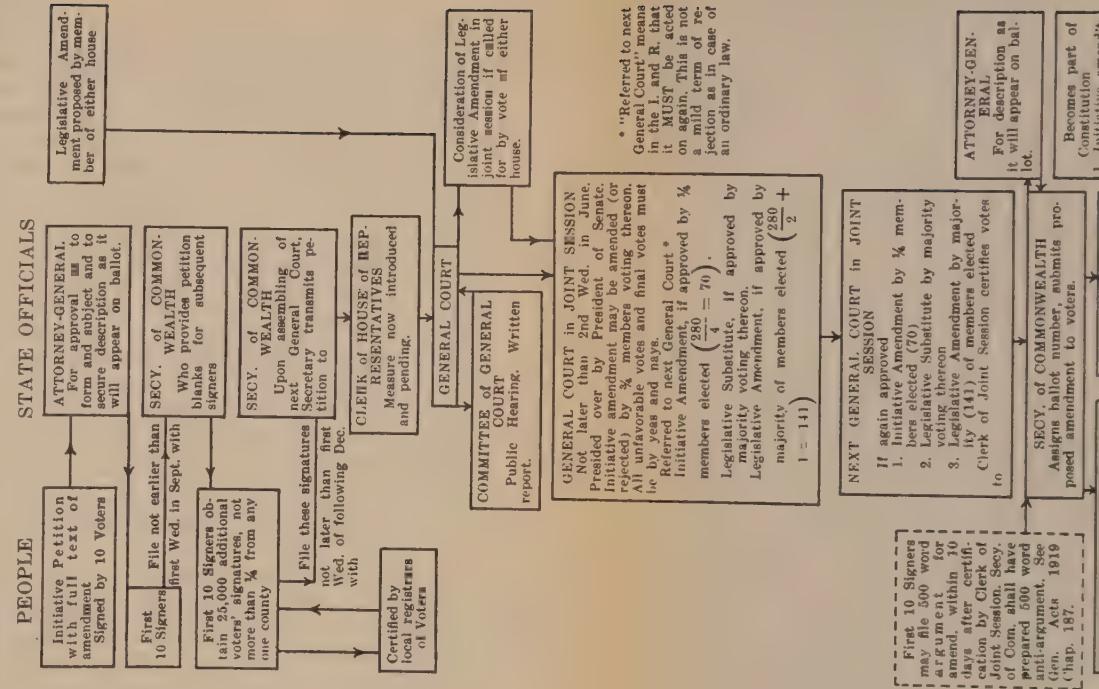
—theories which in some instances are still generally adhered to but which in other cases have been relegated to the lumber-room of discarded doctrines. The newer constitutions either omit these theories altogether or present them in a revised, modernized form. More important, in any event, are the provisions relating to certain concrete fundamental rights of the citizen, such as religious freedom and freedom of speech and the press, the right to keep and bear arms and to be exempt from unlawful searches and seizures, the privilege of the writ of habeas corpus, and the right to bail and to trial by jury; also the clauses which prohibit ex post facto laws, laws impairing the obligation of contracts, cruel and unusual punishments, and the deprivation of life, liberty, or property without due process of law. Many of these stipulations merely duplicate, of course, the limitations imposed upon the national government by the first eight amendments to the national constitution, and likewise those imposed upon the states in Article I, section 10, of that instrument.¹

Important modifications of these ancient rights—especially the right of trial by jury and of indictment by grand jury—have been introduced in some of the more recent constitutions, notably that of Oklahoma; and new clauses have been inserted dealing with problems arising out of the remarkable growth of business corporations. Indeed, in view of the restrictions on the states contained in the first article of the national constitution and in that clause of the Fourteenth Amendment which prohibits the states from depriving any person of life, liberty, or property without due process of law, various provisions of the state bills of rights have become superfluous; and their retention often results in conflicting decisions of state and federal courts when interpreting duplicated clauses in the state and national constitutions. The state constitutions might well, therefore, be shortened by the excision of such clauses. It is difficult, however, to imagine a constitutional convention with the boldness and originality to propose the omission of any of the venerable guarantees; and they rarely fail to reappear in full array when a constitution is revised.

The alteration of a state constitution is everywhere a more difficult and roundabout process than the alteration or repeal of a statute. At the present time there are three principal methods of originating amendments to state constitutions, at least two being

MASSACHUSETTS. CONSTITUTIONAL AMENDMENTS.

The Initiative and Referendum Amendment provides two methods for amending the constitution of Massachusetts:
1. By Initiative Petition; an amendment so proposed is designated an Initiative Amendment or an alternative thereof proposed by a member of either house and designated a Legislative Substitute.
2. An amendment proposed by a member of either house and designated a Legislative Amendment.



¹Pp. 173-174 above. See *Ill. Const. Conv. Bull.*, No. 15 (1920), "The Bills of Rights."

found in operation in the great majority of states,¹ namely (1) by popular initiative, (2) by legislative proposal, and (3) by the action of a constitutional convention. Amendments proposed in either of the first two ways must, in every state except Delaware, be ratified by the voters before becoming effective; and the same is almost universally true of amendments originating in constitutional conventions, although in some instances popular ratification has not been required.

Under the popular initiative, any individual or group of citizens may draft a proposed amendment and, by securing the signatures of a certain number of qualified voters to a petition, bring about its submission to a popular vote. If the proposal receives the number of votes required by the constitution, it is adopted and becomes, to all intents and purposes, as binding as if it had formed a part of the original instrument. The use of the popular initiative in connection with constitutional amendments began in Oregon in 1902 and is now authorized in twelve other states, the latest adoption being in Massachusetts in 1918.² To make an initiative effective, there must be either a definite number of signatures, as 10,000 in North Dakota and 25,000 in Massachusetts, or a number equal to a certain percentage of the total vote cast for some state officer at the last preceding state election. This percentage varies from eight in California and Oregon and ten in Michigan and Ohio to fifteen in Arizona, Oklahoma, and Nebraska; and with a view to insuring a fairly widely distributed demand for a proposed amendment, Missouri requires the signatures to come from voters in two-thirds of the congressional districts of the state. Several other states have a similar requirement.

In Massachusetts the proposed amendment must first be submitted to the state legislature; and the approval of at least one-fourth of all the members of two successively elected legislatures, in joint session of the two houses, must precede a referendum. The legislature may submit to the voters a competing or substitute measure. In most states where the initiative is authorized for con-

CHAP.
XXXIV

1. By
popular
initiative

(a) Pro-
cedure

(b) Limi-
tations

¹ For additional details concerning the different methods of amending constitutions, see *ibid.*, No. 1 (1920), "The Amending Article"; and J. W. Garner, "The Amendment of State Constitutions," *Amer. Polit. Sci. Rev.*, I, 213-247 (Feb., 1907).

² The initiative for constitutional amendments is now authorized in Arizona, Arkansas, California, Colorado, Massachusetts, Michigan, Mississippi, Nevada, North Dakota, Ohio, Oklahoma, and Oregon. In 1914-1916 Mississippi voted favorably on an amendment providing for the constitutional initiative; but, in October, 1922, the state supreme court held that the amendment had not been legally adopted. See *Amer. Polit. Sci. Rev.*, XVII, 434 (Aug., 1923).

stitutional amendments, proposals may relate to any provisions found in the constitution, without restriction; but in Massachusetts there are several constitutional provisions which cannot be changed through the popular initiative.¹

(c) Size of
popular
vote
required

For the adoption of popularly initiated amendments, some states lay down requirements which do not apply to amendments originating in other ways. Thus in Massachusetts and Nebraska an initiated amendment must receive not only a majority of all the votes cast thereon, but also thirty and thirty-five per cent, respectively, of the vote cast at the election. In Arkansas, on the other hand, an amendment initiated by popular petition may be adopted by a simple majority, whereas a higher vote is required for the adoption of amendments submitted by the legislature. From the first adoption of the constitutional initiative in 1902 down to and including 1926, the number of amendments proposed by that method in the various states was somewhat over 200, of which at least sixty-seven, or about thirty-four per cent, were subsequently ratified.

2. By leg-
islative
proposal

The method of originating amendments by legislative proposal is much older and more generally found than the popular initiative, and consequently is more frequently employed. From 1900 to 1926, it is estimated that between 1,700 and 1,800 amendments were submitted by the different legislatures, and that about sixty per cent of the proposals were adopted.² This method is authorized in every state except New Hampshire.³ In about one-fourth of the states, including Indiana, Massachusetts, New York, and Pennsylvania, proposed amendments must be passed by two successive legislatures; and in Delaware this completes the amending process. In South Carolina and Mississippi an amendment proposed by the legislature is voted on directly by the people, but the power to take final action is vested in the next succeeding legislature. In a majority of states a proposed amendment must receive a two-thirds or a three-fifths vote of all members elected to each house, only nine states permitting a bare majority vote. There are other restrictions in some states which, alone or in combination with those just mentioned, make it almost impossible to amend the constitution without calling a convention; and it was largely because of these difficulties that the advocates of woman suffrage concentrated their efforts

¹ For the list of excepted subjects, see p. 710, n. 2.

² W. F. Dodd, *State Government*, 125.

³ In that state all amendments must originate in a constitutional convention.

upon securing an amendment to the national constitution instead of waiting for separate state action.

CHAP.
XXXIV

Limitations as to the number, the frequency, and the character of amending proposals are found in Illinois, Indiana, Pennsylvania, and eight other states. In Illinois, for example, the same legislature may not propose amendments to more than one article of the constitution, and in any case amendments to the same article may not be proposed oftener than once in four years; while New Jersey, Tennessee, and Vermont¹ permit the submission of amendments only once in five, six, and ten years, respectively.

Limita-
tions

Other obstacles to the adoption of amendments are to be found in the requirements concerning the size of the popular vote requisite for ratification. In most states an affirmative majority of all votes cast on the proposal is sufficient; but in twelve states, including Illinois, Indiana, and Minnesota, a larger vote is necessary. At least ten states require that a measure shall receive a majority of all votes cast at the election in which it is submitted. Inasmuch as fewer votes are generally cast for amendments than for the candidates voted for at the same election, this requirement "in effect provides that all abstinence from voting shall be treated as negative voting, and it has often proved impossible to obtain, even upon important questions, an affirmative majority of the total vote cast in the general election." For this reason, six out of thirteen amendments submitted by the Illinois legislature since 1870 have failed of adoption, although all but one of them received a greater affirmative than negative vote. For example, an amendment was submitted in 1916, authorizing some modification of the uniform general property tax, and received 656,298 affirmative votes and only 295,782 negative votes. Nevertheless it failed of adoption because the affirmative vote was less than a majority of 2,192,734, the total vote cast at this election for presidential electors.² In some states this difficulty may be avoided by submitting amendments at special elections when no officers are to be chosen, in which case a majority

Size of
popular
vote

¹ In Vermont it is customary to appoint a commission to assist the legislature in preparing amendments to be submitted to popular vote. Such a commission was also authorized in Pennsylvania in 1919. See E. C. Mower, "Constitutional Amendments in Vermont," *Amer. Polit. Sci. Rev.*, XVII, 72-79 (Feb., 1923); E. L. Burnham, "The Pennsylvania Commission on Constitutional Amendment," *Nat. Mun. Rev.*, X, 151-155 (Mar., 1921); W. D. Lewis, "Constitutional Revision in Pennsylvania," *Amer. Polit. Sci. Rev.*, XV, 558-565 (Nov., 1921).

² For similar results in Minnesota, see W. Anderson, "The Need for Constitutional Revision in Minnesota," *Minnesota Law Rev.*, XI, 189-216 (Feb., 1927).

of those voting on any particular amendment is usually equivalent to a majority of those voting at the election. Rhode Island and New Hampshire require that proposed amendments be approved by a three-fifths and two-thirds vote, respectively, of the electors voting thereon, while in Indiana amendments must be approved by a majority of all the electors of the state.

Many other states formerly had restrictions upon the amending process similar to those just mentioned. But there has been a very general tendency in the past two or three decades to do away with these obstacles and to make the adoption of amendments easier, the most conspicuous illustration being the setting up in some states, as we have noted, of the popular initiative as an alternative to legislative action. The states showing the greatest activity prior to 1920 were California with a total of 150 amendments submitted, Louisiana with 134, Oregon with 88, Ohio with 71, and Colorado, Georgia, New Jersey, South Dakota, and Michigan each with fifty or more. Since 1920 California, with 65, has again far outstripped her sister states in the number of amendments submitted either by the legislature or through popular initiation, her nearest competitor again being Louisiana with 39.

When only a few specific amendments are to be considered and quick results are desired, the methods of popular initiative and legislative proposal are preferable to any others. But when a thoroughgoing revision is contemplated they are hardly adequate.¹ This can best be undertaken by a constitutional convention, consisting of delegates specially chosen by the voters for the purpose. A convention, however, is a cumbersome and expensive method, and one not calculated to bring about immediate changes, however urgent they may be; indeed in some states a constitutional convention cannot be authorized, elected, and assembled, and its work submitted to the voters, in much less than three or four years. In New Hampshire the constitutional convention is the only authorized method of proposing amendments, but in all other states except Rhode Island it is an alternative method. It is expressly or impliedly authorized by the constitutions of three-fourths of the states; and in the remaining twelve it is the generally accepted view (save in Rhode Island) that the legislature may legally provide for the meeting of a convention, notwithstanding that the constitution is

¹ In Connecticut in 1907 and in Indiana in 1911 a complete legislative revision of the constitution was submitted to popular vote and in both instances rejected. See *Amer. Polit. Sci. Proceedings*, VII, 43-52 (1911).

silent on the subject. As a matter of fact, conventions have been assembled in all of these states with the exception of Rhode Island.¹

CHAP.
XXXIV

(a) Call-
ing con-
ventions

In Maine and Georgia the legislature is given full power to call a convention without waiting for any popular mandate on the subject, but in the great majority of states the question whether a convention shall be called is first submitted to popular vote, although the constitution may not expressly require it.² The submission of this question periodically is required in seven states, namely, New Hampshire, every seven years; Iowa, every ten years; Michigan, every sixteen years; and Maryland, New York, Ohio, and Oklahoma, every twenty years. In all of these states except Maryland and New Hampshire the question may also be submitted at other times. Where the popular initiative exists, it is not always clear that the question of calling a convention may be brought to a vote independently of any legislative action, but such procedure seems to be authorized in Arizona, Michigan, Maine, Oregon, Missouri, and Oklahoma.

The size of the popular vote required to authorize a constitutional convention varies. In eighteen states, including New York and Ohio, a majority of those voting on the proposition is sufficient, except in Kentucky, where the majority must also equal one-fourth of the votes cast at the preceding election; fourteen states, including Illinois, Minnesota, and Nebraska, require approval by a majority of those voting at a general election, as in the case of amendments originating in legislatures; and Michigan requires a majority vote of the electors qualified to vote for members of the legislature. In all, about 216 constitutional conventions have been held, the most recent being those in Ohio (1912), New York (1915), Massachusetts (1917-19), Arkansas (1918), Nebraska, New Hampshire, and Illinois (1920), Louisiana (1921); and Missouri (1922).³

¹Because the Rhode Island constitution makes no provision for a constitutional convention, the supreme court of that state held in 1883 that there is no legal way by which such a convention can be called. Nevertheless, in 1923-24 a prolonged deadlock occurred in the Rhode Island senate over the attempt of the Democratic minority, assisted by the presiding officer, to force the Republican majority to approve the submission to the electorate of the question of holding a constitutional convention as a means of breaking up the grossly unequal system of representation in the state legislature. See *In re The Constitutional Convention*, 14 R. I., 649 (1883).

²H. Hendriks, "Some Legal Aspects of Constitutional Conventions," *Texas Law Rev.*, II, 195-207 (Feb., 1924).

³Brief summaries of the work of some of these recent conventions will be found in the following articles: R. E. Cushman, "Voting Organic Laws in Ohio," *Polit. Sci. Quar.*, XXVIII, 207-299 (June, 1913); S. G. Benjamin, "The Attempted Revision of the State Constitution of New York," *Amer.*

When a constitutional convention is to be held, detailed provisions usually have to be made by legislation for the nomination, election, convening, and compensation of the members, and for the submission of their work to the voters. Constitutions vary greatly in the extent to which they go into these matters. Almost all of them make provision for the apportionment of delegates, but in eight states all other details are left entirely to the legislature. On the other hand, in three states (New York, Michigan, and Missouri) the constitution itself contains detailed provisions on all of these points, so that the convention assembles as a matter of course after being authorized and elected, without the necessity of any legislative action. In most states the constitution contains a few provisions with respect to the time and method of electing delegates, and perhaps some other points, but leaves most of the details to be provided for by legislation.¹

(b) Size

Constitutional conventions sometimes contain as few as eighty members and sometimes more than four hundred;² in most instances they do not exceed two hundred. The delegates are nominated and elected in accordance with the general primary and election laws, although some states, for example Massachusetts, have made special provision for non-partisan nomination and election. They are usually chosen from the legislative or senatorial districts employed in electing members of the legislature, and not infrequently a few are elected from the state at large.³ The Illinois

Polit. Sci. Rev., X, 20-43 (Feb., 1916); L. B. Evans, "The Constitutional Convention of Massachusetts," *ibid.*, XV, 214-232 (May, 1921); A. E. Sheldon, "The Nebraska Constitutional Convention of 1919-1920," *ibid.*, XV, 391-400 (Aug., 1921); L. D. White, "The Tenth New Hampshire Convention," *ibid.*, XV, 400-403 (Aug., 1921); C. A. Berdahl, "The Louisiana Constitutional Convention," *ibid.*, XV, 565-568 (Nov., 1921); T. G. Gronert, "The Louisiana Constitutional Conventions of 1913 and 1921," *Southwestern Polit. Sci. Quar.*, IV, 301-318 (Mar., 1924); E. Freund, "A New Constitution of Illinois," *New Republic*, XXXIII, 67-69 (Dec. 13, 1922); W. W. Hollingsworth, "The New Constitution Proposed for Missouri," *Nat. Mun. Rev.*, XIII, 96-102 (Feb., 1924); I. Loeb, "The Missouri Constitutional Convention," *Amer. Polit. Sci. Rev.*, XVIII, 18-33 (Feb., 1924).

¹In 1921 the Iowa legislature refused to carry out the popular vote of the preceding November which had been favorable to the calling of a constitutional convention. See *Nat. Mun. Rev.*, X, 315-316 (June, 1921).

²The New Hampshire conventions of 1912 and 1919-20 numbered 413 and 404, respectively.

³The over-representation of rural districts as compared with urban communities, which is found in a number of states (see Chap. xxxv), is apt to appear also in the constitutional conventions. Consequently the representatives of rural sections may exert a greater proportional influence for or against proposed amendments when they originate in the legislature or in a constitutional convention than when amendments may be made under the direct popular initiative. Under the latter the vote of any citizen counts as much in one section of the state as in another.

convention of 1920 consisted merely of two delegates from each of the fifty-one senatorial districts of the state; the New York convention of 1915 consisted of three delegates from each senatorial district and fifteen elected at large; the Massachusetts convention of 1917 had from one to three delegates from each legislative district, four additional delegates from each of the sixteen congressional districts, and sixteen elected at large—a total of three hundred and twenty.

CHAP.
XXXIV

The convention assembles at the state capital on the day designated by law, and organizes by electing one of its members president, providing for a staff of clerks, secretaries, and stenographers, and adopting a set of rules to govern its proceedings. A large body is ill-adapted to the detailed consideration of the great variety of subjects which always come before a constitutional convention, and therefore a somewhat elaborate committee system is employed. The committees are commonly appointed by the president of the convention, although in a few instances committee assignments have been made by a committee specially constituted for that purpose. The number and size of committees naturally vary: in the New York convention of 1915 there were thirty; in the Virginia convention of 1901-02, sixteen; in the Ohio convention of 1912, twenty-five; in the Massachusetts convention of 1917, twenty-four; and in the Illinois convention of 1920, twenty-five. In size, the committees vary from about three members on the less important ones to about twenty on the most important, the average in the recent conventions of Ohio, New York, Massachusetts, and Illinois being approximately fifteen.

(c) Organization

To each committee is customarily assigned one or more sections or articles of the constitution, and all proposals originating either with members of the convention or with people outside are referred to the appropriate committee for preliminary consideration. Committee sessions are often thrown open to the public, and an opportunity is almost always given the advocates and opponents of various changes to present their respective arguments. If the committee approves a given proposal, it is reported to the convention, with or without modification, and is placed on the calendar for consideration in committee of the whole. In general, the proceedings of a constitutional convention and its committees follow the same course as the proceedings of a state legislature.

(d) Procedure

Indeed, constitutional conventions are legislative bodies whose primary, if not sole, function is to draft a new fundamental law

(e) Three theories as to the authority of a convention

for the state or to formulate amendments to the existing constitution. Some conventions, like that in Illinois in 1862,¹ have gone farther than this and have assumed more or less actual management of the state government, displacing existing officers, substituting others chosen by the convention, and attempting to supersede the legislature in various matters. At other times the legislature, in making provision for the meeting of a convention, has attempted to impose limitations upon its work which the convention has wholly or in part disregarded. Naturally, conflicts have resulted as to the proper scope of authority; and out of them three theories have developed.² According to the first, the legislature is supreme and in the act of calling the convention may limit the powers of that body by excluding from its consideration amendments to certain sections of the constitution, by requiring it to submit amendments to certain other sections, by prescribing the manner in which the work of the convention shall be submitted to popular vote, and in various other ways. Those who take this view hold that the convention has no right to disregard or to deviate from any of these statutory restrictions. According to the second theory, the convention is possessed of all sovereign powers of the people, and is the supreme body in the state during its existence, being therefore superior to the legislature or any other branch of the state government. It may disregard any or all limitations which the legislature tries to impose upon its activity, and may, indeed, legally exercise whatever governmental functions it cares to assume.

Each of these two theories has some support in convention precedents and judicial opinion. But the view now most generally held is that a convention is neither sovereign nor wholly subject to the legislature—that, on the contrary, the two are coördinate bodies, each supreme within its proper sphere and bound by the provisions of the existing constitution and statutes. If the constitution authorizes the legislature to impose restrictions on the convention, this body is bound to respect such limitations; on the other hand, the legislature, in the lack of definite constitutional sanction, cannot bind the convention as to what shall be placed in the revised

¹ On the history of this interesting body see O. M. Dickerson, "The Illinois Constitutional Convention of 1862," in *Univ. of Ill. Studies*, I (1905); and *Ill. Const. Conv. Bull.* (1920), "Constitutional Conventions in Illinois," 18-21.

² A good short discussion of these theories is to be found in A. N. Holcombe, *State Government in the United States* (2nd ed., 1926), 126-132; and A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, I, 424 ff.

constitution, or lay other restrictions upon it. The convention, furthermore, may neither supersede any existing organs or agents of state government nor exercise any of the powers assigned to them; its functions are limited to proposing a new constitution or amendments to the existing constitution.

Almost invariably the results of a convention's deliberations have to be submitted to the voters for their approval before going into effect; although in a dozen or more instances in the past hundred years constitutions have gone into operation without popular ratification, the latest being the Virginia constitution of 1902 and the Louisiana constitutions of 1913 and 1921. The vote required for the ratification of the work of a convention is the same as that required for the adoption of amendments proposed by the legislature. A convention may submit its work to the voters in one of three different forms. It may present it as a series of specific amendments, to be voted on separately. This is practicable when only a comparatively small number of amendments are submitted, and was the course followed by the Massachusetts convention in 1917 and 1918, when three and nineteen amendments, respectively, were referred to the electorate. It was also the plan followed in Ohio in 1912, when forty-two proposals were submitted, and in Nebraska in 1920, when forty-one were submitted, although in these instances the numbers were quite properly regarded as excessively large for such procedure. In the second place, a convention may submit a complete new or revised constitution, to be accepted or rejected as a whole, as happened in Michigan in 1908, in Arkansas in 1918, and in Illinois in 1922. This method has the serious disadvantage of forcing non-controversial changes to suffer the same fate as articles which relate to controversial subjects. The opposition to the initiative and referendum or to changes in the system of taxation, for example, may be so strong that, rather than see them adopted, their opponents will vote against the entire document, although everything else in it is quite satisfactory. This is what happened in Illinois in 1922.

The third method is a compromise between the two plans just described. A complete revision of the constitution may be submitted as a single document to be rejected or approved generally, and at the same time one or more controversial sections may be submitted separately. This enables the electorate to approve the greater part of the convention's work and yet to disapprove certain specific features. Such a plan was followed in Illinois in 1870, when eight

separate articles were submitted along with a new and substantially complete constitution, and in New York in 1915, when two proposals were separately submitted along with a liberally revised constitution.¹

The great variety of subjects dealt with in recent constitutional amendments can be indicated in only the most general way. More proposals have had to do with taxation than with any other matter; 257 of this nature were submitted before 1920, of which 142 were adopted. Others related, in considerable but varying numbers, to prohibition, suffrage qualifications, labor legislation, control of corporations of one kind or another, municipal home-rule, indebtedness, ownership of utilities, direct primary laws, absent-voting, the initiative, referendum, and recall, simplification of the amending process, changing elective state offices into appointive ones, enlarging the veto power of the governor and his powers in other respects, extending the constitutional debt limit, authorizing the state to engage in non-governmental undertakings of a business nature, increasing the number of judges or the number of courts, and forbidding a law to be declared unconstitutional by the supreme court if more than one judge dissents.²

The future seems to promise two possible lines of state constitutional development. If the present tendency to incorporate in

¹Some of the more recent conventions, notably the Michigan convention of 1908, the Ohio convention of 1912, and the Illinois convention of 1922, issued addresses in pamphlet form for circulation among the voters of the state, in which all the main features of their work were set forth, together with explanations of the various changes proposed.

The Model State Constitution, adopted by the National Municipal League in 1921, provides three methods of constitutional amendment (sections 94-98), as follows: (1) A majority of all the members of the legislature may submit proposals of amendment, which become effective if approved by a majority of those voting thereon, provided the affirmative vote is not less than twenty per cent of those voting at the election. (2) Amendments may be submitted by popular petition signed in at least one-half of the counties of the state by a number of qualified voters equal to five per cent of the total vote cast for governor at the last election. For adoption, the same vote is required as in (1) above. (3) The question of calling a constitutional convention may be submitted either by a majority of all the members of the legislature or by a popular petition signed as provided in (2) above. The convention is held if the affirmative vote exceeds the negative vote and is not less than twenty per cent of the total vote cast at the election. Amendments submitted by the convention may be adopted by a majority of those voting thereon.

²On recent constitutional amendments, see annual editions (to 1919 and since 1925) of the *American Year Book* (New York); *Amer. Polit. Sci. Rev.*, IX, 101-107 (Feb., 1915); X, 104-109 (Feb., 1916); XII, 268-270 (May, 1918); XIII, 429-447 (Aug., 1919); XVI, 245-275 (May, 1922); XVII, 72-79 (Feb., 1923); XIX, 541-544 (Aug., 1925); *Nat. Mun. Rev.*, X, 235-238 (Apr., 1921); XII, 200-202 (Apr., 1923); XV, 42-65 (Jan., 1926); XVI, 642-661 (Oct., 1927); *Polit. Sci. Quar.*, Supplement, XL, 80-99 (Mar., 1925), XLI, 69-72 (Mar., 1926).

the constitution matters not of fundamental importance but primarily of a legislative character, and to deal with these matters in detail, continues unabated, more and more frequently will amendments become necessary in order to meet changed conditions. This will inevitably lead to the adoption of easier amending processes, *i.e.*, processes increasingly resembling those now employed in the enactment of ordinary statutes either by the legislature or by direct popular action through the initiative and referendum. In this way the historic dividing line between constitutional and statutory laws will become more and more hazy, if not quite indistinct; and we may ultimately arrive at substantially the same procedure for the enactment of both. On the other hand, we may see a reaction against the comprehensive and bulky constitutions of the past few decades in favor of shorter instruments dealing only with matters of a fundamental and truly constitutional nature. Should this come about—there are only slight indications that it will—there will obviously be less need of frequent amendment, and the present sharp distinction between the modes of enacting constitutional provisions and ordinary statutes may be expected to continue to be reflected in more difficult amending procedure.

REFERENCES

- A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), I, 404, 424, 435, 438, 441.
- J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chaps. XXXVII-XXXVIII.
- J. Q. Dealey, *The Growth of American State Constitutions* (Boston, 1915), Chaps. I-VIII.
- A. N. Holcombe, *State Government in the United States* (2nd ed., New York, 1926), Chaps. IV-V, XII, XV.
- E. Kimball, *State and Municipal Government in the United States* (Boston, 1922), Chap. II.
- W. F. Dodd, "The Function of a State Constitution," *Polit. Sci. Quar.*, XXX, 201-222 (June, 1915).
- , *The Revision and Amendment of State Constitutions* (Baltimore, 1922).
- , *State Government* (New York, 1922), Chap. v.
- J. M. Mathews, *American State Government* (New York, 1924), Chap. II.
- R. S. Hoar, *Constitutional Conventions: their Nature, Powers, and Limitations* (Boston, 1917).
- W. McClure, *State Constitution-Making, with Special Reference to Tennessee* (Nashville, 1916).
- C. A. Beard, "The Constitution of Oklahoma," *Polit. Sci. Quar.*, XXIV, 95-115 (Mar., 1909).

- R. L. Owen, "Comments on the Constitution of Oklahoma," *Amer. Polit. Sci. Assoc. Proceedings*, V, 185-191 (1908).
- C. Kettleborough [ed.], *The State Constitutions* (Indianapolis, 1918).¹
 ———, *Constitution-Making in Indiana* (2 vols., Indianapolis, 1916).
- National Municipal League, *A Model State Constitution* (Pamphlet, New York, 1921).
- J. D. Hicks, "The Constitutions of the Northwest States" *Univ. of Neb. Studies*, XXIII, Nos. 1-2 (Jan.-Apr., 1923).
- III. *Const. Conv. Bull.* No. 1 (Springfield, 1920), "Procedure and Problems of the Constitutional Convention."
- Mass. Const. Conv. Bull.* No. 1 (Boston, 1917), "Procedure of Constitutional Conventions."
- Transactions of the Commonwealth Club of California*, IX, 505-547 (Sept., 1914), "California's Constitution."
- N. Sargent, "The California Constitutional Convention of 1878-79," *California Law Rev.*, VI, 1-22, 114-133 (Nov., 1917-Jan., 1918).
- S. E. Moffatt, "The Constitutional Referendum in California," *Pol. Sci. Quar.*, XIII, 1-18 (May, 1898).
- O. K. McMurray, "Some Tendencies of Constitution-Making," *California Law Rev.*, II, 203-224 (Mar., 1914).
- W. C. Palmer, "The Sources of the Oregon Constitution," *Oregon Law Rev.*, V, 200-215 (Apr., 1926).
- R. P. Dietzman, "The Four Constitutions of Kentucky," *Kentucky Law Jour.*, XV, 116-127 (Jan., 1927).
- I. Loeb, "Constitutions and Constitutional Conventions in Missouri," *Mo. Hist. Rev.*, XVI, 189-238 (Jan., 1922).

¹The most convenient and complete compilation of the constitutions in force at the date of publication.

CHAPTER XXXV

THE LEGISLATURE: STRUCTURE AND COMPOSITION

A cursory examination of the constitutions of the forty-eight states will disclose the fact that with only three exceptions¹ the article relating to the structure and composition of the legislative department precedes the sections devoted to the executive and judicial branches. This order of precedence is fully justified.

The legislature² is the main policy-determining organ of the state government; and, in that capacity, its potentialities for good and for evil are almost unlimited. Every citizen, therefore, ought to be solicitous that it be not unduly hampered by constitutional restrictions, and that it be of such outward structure and such internal organization as will render it an effective and responsible agency of the public will: it should not be of such size as to be unwieldy;² nor should its form be such as needlessly to complicate the process of law-making, or to facilitate evading responsibility for what it enacts or fails to enact;³ its internal organization and the rules governing its proceedings should be free from unnecessary complications, should seek to expedite work while yet giving each bill a fair opportunity to be considered, and should ensure full publicity for discussions, committee reports, and decisions; in the handling of financial legislation there should be close coöperation between those agencies of the government which are charged with raising the state's revenue and those which are authorized to appropriate and expend it. Endowed with extensive powers to control, for weal or woe, most of the business and social relationships of citizens, as well as to regulate their civil rights and duties, the law-making body should manifestly be composed of persons who are at least reasonably representative of the principal geographical sections, and of the main social and economic groups, within the state. The members should be chosen on a basis, and in a manner,

Essentials
of a good
law-making
body

¹ Colorado, Kansas, and Maryland.

² This is the term commonly employed; but it may be noted that in about half of the states the body is officially known as "the general assembly," in a few states as "the legislative assembly," and in Massachusetts and New Hampshire as "the general court."

calculated to give all important elements a chance to be heard. Although highly desirable, it is not essential that they be experts in either the technique or the subject-matter of legislation. It is, however, indispensable that they have the assistance of expert draftsmen, that they be in a position to avail themselves of expert advice concerning the complicated problems which come before them, and that they be able to draw freely upon the experience of other states and of all officials charged with the administration of the laws which they enact.

Any one at all familiar with the organization and workings of our state legislatures knows that no one of the forty-eight fulfills all of the foregoing requirements, and that few attain to more than one or two of them. Many reasons can be assigned. For the present it will suffice to mention only the most fundamental one, which is the fact that hitherto the ingenuity of constitution-makers has been expended almost exclusively upon defining and restricting the legislature's powers, on the apparent assumption that the legislature is itself, at best, a necessary evil; with the result that little has been done toward working out plans by which the legislature can be made a really responsible law-making body, able to promote the general welfare of the people of the state by wise, carefully drawn, and well-considered laws.

Bicameral
structure X

Every state legislature is organized in two houses, both elective,¹ and both endowed with substantially the same powers. In the original thirteen states the bicameral plan arose naturally out of the conflict between aristocratic and democratic elements in the colonial period; and by the close of the Revolution it had been adopted in all of them except Pennsylvania and Georgia.² In the states later admitted to the Union, the plan was followed as a result of more or less conscious imitation of the older states, or of the national Congress, but with little of the justification which existed in the earlier cases; in part, it has been perpetuated through unquestioning adherence to the ancient formula of divided powers and checks and balances. Under the earliest state constitutions there were higher property qualifications for membership in the

¹ Candidates for election to the legislature are nominated in some states, mainly in the South, by a convention, but in most states by direct primary. Election is by secret ballot (except where voting machines are employed); and the polling often occurs on the same date as presidential and congressional elections.

² Vermont also had a single-chambered legislature until 1836. See T. F. Moran, "Rise and Development of the Bicameral System in America," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XIII (Baltimore, 1895).

state senate, and for the privilege of voting for senators, than in the case of the other branch of the legislature; so that the two houses were elected by different constituencies and represented somewhat different social and economic groups or interests. This distinction, however, long ago disappeared, and practically the only differences today between the two houses are the longer term for which senators are usually chosen,¹ the slightly higher age or residence qualifications for membership in the senate, and the fact that the terms of senators usually do not all expire at the same time as do the terms of members of the lower house. So far as determined by suffrage qualifications, the electorates for both houses are now identical. The idea that a bicameral legislature is necessary in order that different social and economic groups in the state may be represented no longer has any substantial foundation. The retention of the bicameral system has to be justified mainly on the ground that it provides representation for distinct geographic areas in one branch and for units of population in the other, or that it is effective as a means of preventing undesirable legislation by ensuring, presumably, a double consideration for all laws prior to their enactment.

The first of these possible justifications has not commended itself to the majority of our states; in only a very small group, as we shall see, is either house made up solely of representatives from geographical areas as such. The bicameral system undoubtedly facilitates the maintenance of a balance of power between city and country districts, and it finds support as a mode of protecting the rights of rural minorities against the possibility of infringement of urban majorities. Defenders of the system are, however, more apt to lay stress upon the checking, or revising, function which the two-house plan supposedly ensures. For entirely satisfactory conclusions on this point there is need of a thorough study, in a number of typical states, of the actual rejections and amendments by each house of measures originating in the other house. Unfortunately such studies have been made in only a very few

Is the retention of the bicameral system justified?

¹ In thirty-one states the term of senators is four years; in sixteen states, two years; and in one state (New Jersey), three years. The term of members of the lower house is one year in two states (New Jersey and New York), four years in four (Alabama, Louisiana, Maryland, Mississippi), and two years in all the rest. For tables showing the membership, terms, and frequency and limitations of sessions in the various states, see *Mass Const. Conv. Bull.* No. 9 (1917), 7-8; *Ill. Const. Conv. Bull.* No. 8 (1920), "The Legislative Department," 534; *Congressional Digest*, V, 222 (Sept., 1926).

states, notably in the case of the New York legislature of 1910.¹

Of 1,036 bills passed by the New York senate in the year mentioned, only 69 were rejected by the lower house, or assembly; and of 1,120 passed by the assembly, only 161 were rejected by the senate. In other words, the senate killed fourteen per cent of the assembly bills, and the assembly killed six per cent of the senate bills. Even this low mortality rate might have been significant if the defeated bills had proposed radical changes in public policy. As a matter of fact, however, they were relatively unimportant measures. The veto of neither house was even approximately as effective as that wielded by the governor and by city authorities,² who killed 240 measures passed by both houses, or twenty-five per cent of the total number. Furthermore, appropriations were reduced thirteen times as much by the governor's veto as by the veto of the senate upon money bills originating in the assembly. It also appears that of the 967 bills which passed both houses, 505 passed the second house without any change whatever, and that 58 of them were afterwards recalled by the house in which they had originated; while 102 others were vetoed. Apparently, therefore, the bicameral legislature in New York failed, in 1910 at all events, to fulfill one of the chief functions for which it is often contended that a bifurcated legislature is essential.

A similar careful study of the work of the Illinois legislature in 1919 shows that the house killed twenty-five per cent of the bills originating in the senate, while the latter killed only nine per cent of the house bills coming to it. In 1921 the corresponding figures were forty-five and eleven per cent, respectively. In Wisconsin, in 1919, the senate and assembly each defeated thirteen per cent of the bills coming from the other branch; and in 1921, the percentages were again exactly the same for the two houses, namely seventeen. As in the case of the New York legislature, the majority of the bills which thus failed of enactment were relatively unimportant, if not quite insignificant; none of them would be classed as vicious or even of dangerous tendency, while a few might fairly be characterized as not undesirable. At the very least, therefore, it

¹ See D. L. Colvin, *The Bicameral Principle in the New York Legislature* (New York, 1913); J. D. Barnett, "The Bicameral System in State Legislatures," *Amer. Polit. Sci. Rev.*, IX, 449-466 (Aug., 1915); *Ill. Const. Conv. Bull.* No. 8 (1919) "The Legislative Department," 528-532.

² Acts affecting particular cities may, under the New York constitution, be accepted or rejected by the city authorities.

may be said that these figures constitute no very impressive argument for the retention of the bicameral system on the ground that one chamber exercises a wholesome check upon the legislative output of the other.¹ If, in this connection, one recalls the fact that everywhere, except in North Carolina, the governor is endowed with the veto power (a weapon which governors did not have under most of the early state constitutions), and that the power of the courts to declare laws unconstitutional is fully developed, it is not easy to avoid the conclusion that the value of the bicameral system, as a means of setting up an additional hurdle over which legislative measures must pass before becoming laws, is hardly sufficient to warrant its retention, in the face of the positive evils which accompany, and in some instances are inseparable from, that system.²

CHAP.
XXXV

It is significant that many a city which started out with a bicameral council has long since abandoned it, because of the delays which it entailed, the friction which frequently arose between the two chambers, the increased expense involved, and the manifold opportunities afforded for chicanery and corruption. Today not one of our twenty-five largest cities retains the bicameral council.³ Yet in some of these cities the single-chambered council not only represents more people than many a state legislature does, but also raises and appropriates more money and deals with important matters affecting the interests of more people than a considerable number of our state legislatures put together. The same abandonment of the bicameral system has taken place in five of the Canadian provinces, and today seven of the nine provinces have single-chambered legislatures. In all the Swiss cantons having representative law-making bodies the legislature is unicameral, as is the national parliament in Bulgaria, Yugoslavia, and Norway. Altogether, on the eve of the World War, more than sixty provin-

Abandonment of the bicameral system in cities and in Canadian provinces

¹M. W. Simons, "Operation of the Bicameral System in Illinois and Wisconsin," *Illinois Law Rev.*, XX, 674-686 (Mar., 1926). For similar facts relating to the New Mexico legislature of 1925 and the Nebraska legislatures of 1921 and 1923, see J. E. Hall, "The Bicameral Principle in the New Mexico Legislature," *Nat. Mun. Rev.*, XVI, 185-190, 255-260 (Mar.-Apr., 1927); R. S. Boots, "Our Legislative Mills: Nebraska," *ibid.*, XIII, 118 (Feb., 1924). Cf. V. J. West, "California—the Home of the Split Session," *ibid.*, XII, 369-370 (July, 1923).

²The "Model State Constitution" adopted by the National Municipal League in 1921 provides for a unicameral legislature, the members of which are to be chosen by a system of proportional representation.

³In the enactment of certain "local laws" the board of estimate acts as a second legislative chamber in New York City.

cial or national legislative bodies were organized on the single-chamber plan.¹

The advantages of the unicameral system are unmistakable. In the first place, it enables public attention to focus promptly upon a narrow and well-defined area, and therefore permits of a real scrutiny of legislative proceedings while laws are being made, a thing which is practically impossible in the case of our present large two-chambered legislatures with their multitude of committees. In the second place, when there is but one chamber responsibility cannot be bandied back and forth between two houses, members of one house working with members of the other to defeat legislation, and putting it beyond the power of the public to fix the responsibility. In the Ohio legislature of 1919 a competent eye-witness observed that bills were passed in one house out of courtesy to one member or another, or for political reasons, with a reasonable certainty that they would be "put to sleep" in the other body. Opponents of certain bills declared quite openly that they cared little if the measures objected to were acted upon favorably in the house in which they were introduced, since they could be better attacked in the other house. The same witness adds: "Each house became, so far as legislation initiated by the other is concerned, either a mere formal ratifying body, or a pleasant and easy legislative death-bed, as per agreements made beforehand."² In this matter the Ohio legislature is not exceptional; the same practices appear in probably every state.

Agreements of the kind just mentioned are facilitated by the existence of a dual committee system in the great majority of states, each house having its full set of committees. This duplication furnishes abundant opportunities for shifty deals between two sets of committees, and two sets of political leaders, which still further serve to cloud issues and dissipate responsibility. The disappearance of the dual committee system (including the peculiarly irresponsible and autocratic conference committees) which would, of course, follow the abandonment of the bicameral system, would greatly simplify the legislative process and eliminate much

¹ It should also be borne in mind that when we proceed to enact our most fundamental organic law, the state constitution, we invariably employ, not a bicameral body, but the single-chambered constitutional convention.

² C. A. Dykstra, in *Civic Affairs*, August, 1919. See also J. W. Garner, "Legislative Organization and Representation," in *Ill. State Bar Association Proceedings* (1917), 376 ff. For a trenchant criticism of the bicameral system in Kansas, see G. H. Hodges, "Distrust of State Legislatures," printed in J. T. Young, *The New American Government and its Work* (1913), 647-649.

of the delay which nowadays blocks *good* as well as *bad* measures. Deadlocks and friction between the two houses would cease when two houses no longer existed, and the cost of supporting the legislature would be greatly diminished. At all events, it is believed that better results would be obtained with the same expenditure if the membership of the legislature were reduced to not more than fifty and the members were paid salaries sufficient to compensate men of large caliber for the sacrifices which service in the legislature always entails for the successful professional or business man.

That the movement for the abandonment of the bicameral system in this country has passed beyond the stage of merely academic interest appears from the following facts. In messages to legislatures or in public addresses, the governors of Arizona, Washington, and Kansas, in 1913, and of South Dakota in 1926, recommended constitutional amendments for a one-house legislature.¹ Such amendments have actually been submitted to a popular vote in Oregon, Oklahoma, and Arizona; and although in every case they failed, the size of the vote in their favor is significant when one considers the deep-seated traditions, interests, and prejudices which are bound up with the bicameral system. In Oregon, in 1912, the proposed amendment received over 30,000 votes, although more than 71,000 were cast against it; in 1914, a similar proposal received 62,376 votes, when 123,429 were cast against it. In Oklahoma, in 1914, the amendment received 71,700 favorable votes, against 94,600 in opposition. In Arizona, in 1916, it received 11,631 votes, to 22,286 in opposition.

Even state legislators themselves have begun to recognize the clumsiness, ineffectiveness, and other defects of the bicameral system. In Nebraska a joint legislative committee made a report (1913) recommending that in 1916 a constitutional amendment be submitted providing for a legislature of one house. The proposal received the support of a majority in the 1915 session, but not enough votes to submit it to the electorate. In the constitutional convention of 1919-20, a resolution for the separate submission of a unicameral proposition was defeated only by a tie vote. In the California legislature of 1914 a proposed constitutional amendment, originating with the Commonwealth Club of San Francisco and providing for a single legislative body of only forty members, passed the lower house by a vote of 37 to 30, and

¹ *Amer. Polit. Sci. Rev.*, IX, 316-317 (May, 1915); *ibid.*, XXI, 100, n. 20 (Feb., 1927). See also W. F. Dodd, *State Government*, 156-162.

the senate by a vote of 19 to 15. This, however, lacked five votes of being a majority of the entire legislature, and therefore the proposal failed to be referred to the people. In other legislatures, including those of Michigan and Washington, and among many public officers, there have been increasing indications of a consciousness that the bicameral legislature has little or no place in a genuinely democratic and effective scheme of state government.¹

Changes in the size, as well as in the structure, of most of our state legislatures would also contribute to their increased effectiveness, and would reduce the ease with which responsibility for legislative action or inaction may now be avoided. For purposes of deliberation, the senates are, in most of the states, more nearly of ideal size than are the lower houses. Senates range in membership from seventeen in Delaware, eighteen in Utah, and nineteen in Arizona, up to fifty-one in New York and Illinois and sixty-seven in Minnesota, the last-mentioned numbers being rather larger than is desirable. The lower houses, on the other hand, are generally so large as to be ill-adapted for purposes of general discussion, with the result that great power in determining both the form and the substance of legislation has perforce to be lodged in irresponsible committees. Arizona and Delaware have lower houses of suitable size for deliberation, consisting of thirty-five members in each case. At the other extreme stand Vermont, Connecticut, and New Hampshire, with lower houses consisting of 247, 268, and 421 members, respectively. More than half of the states have lower houses of over one hundred members.

Our legislatures have been made needlessly large and unwieldy in an effort to give them a broadly representative basis, it being mistakenly supposed that there is a direct connection between the size of a body and its representative character. If the people are sufficiently represented in the lower branch of Congress under a system which gives but one representative to more than two hundred thousand inhabitants, it would seem that our state legislatures would not suffer in their representative character by a consider-

¹ The New York Bureau of Municipal Research, after surveying the state agencies in Nevada, in 1924, recommended a single-chambered legislature for that state. *Nevada State Journal*, Nov. 20, 1924, cited in *Nat. Mun. Rev.*, XIV, 679 (Nov., 1925). The legislative committee of the Citizens' League of Cleveland, in reporting upon the work of the Ohio legislature of 1927, expressed the belief that the adoption of a single-house legislature "is a subject which should be given the most serious thought by the people of the state before the next constitutional convention is called in 1932." *Greater Cleveland*, II, 182 (June 15, 1927).

able reduction in size; municipal councils in numerous cities have been reduced to nine, five, or even three, members, without impairing their representative character. Even a single public official—the president, a governor, or a mayor—often more truly represents public opinion than Congress, a legislature, or a city council.

The size of the two houses is determined in different ways in different states. The constitution usually lays down some general rule or principle to guide the legislature in apportioning representatives and senators among the various political subdivisions.¹ In fewer than a dozen states, including Illinois and California, the constitution fixes the exact number of members in each house, a plan which has the advantage of preventing an almost certain increase in the size of the legislature with every reapportionment, such as has taken place in the history of Congress. At the same time, this method has the disadvantage of reducing periodically, both proportionally and absolutely, the representation from the slower-growing sections of the state if reapportionment acts are passed every five or ten years. On the other hand, if such acts are not passed at stated intervals, the effect is to reduce proportionally the representation from the more rapidly growing communities. But in most states the constitution leaves the size of the two houses undetermined, and in such cases the legislature may, within broad limits, make whatever arrangements it desires.

In establishing units of representation in the legislature, state constitutions and statutes follow no uniform rule. In about a third of the states certain geographical areas, regardless of differences in population, must have at least one member of the lower branch of the legislature; and in the case of Maryland, Montana, New Jersey, and South Carolina, this rule applies also to the senate. In Vermont, for example, every town is entitled to send one member to the lower house, and no more; so that a town with a few score inhabitants has precisely the same representation as a city of twenty thousand. Similar "rotten boroughs" exist in New Hampshire, Connecticut, and Rhode Island. In Connecticut four small towns having a combined population of less than 2,500 have the same number of representatives (eight) as New Haven, Bridgeport, Waterbury, and Hartford, with their combined population

Basis of
representa-
tion

¹ The various constitutional provisions on this point are summarized and classified in *Ill. Const. Conv. Bull.*, No. 8 (1920), "The Legislative Department," 532 ff.

of more than half a million.¹ In eighteen states outside of New England, it is the county that holds this favored position. Nearly everywhere else there is a more or less sincere attempt to establish and maintain districts of substantially equal population, large counties being subdivided for this purpose and small counties being grouped into districts of fairly equal population; and these divisions, under various names, such as senatorial, assembly, or legislative districts, are made the bases of representation in the legislature. In a few states, notably Illinois, Minnesota, and North Dakota, there is but one series of districts for the election of members of the two branches of the legislature, a plan which has the advantage of permitting the development of some fairly permanent community interests in legislative representation within particular areas.² But as a rule the senatorial districts are different from, and larger than, the assembly districts. It is not always the *total* population, however, that is taken as the basis of representation. Oregon, for example, reckons only the white population; Arkansas and Indiana count only the adult male inhabitants; Maine, New York, and North Carolina exclude unnaturalized aliens, and California excludes aliens who are not eligible to become citizens; Massachusetts and Tennessee base representation upon the number of qualified or legal voters.³

Whatever the basis of representation, the districts are almost always laid out by the legislature; and a number of constitutions definitely make it the duty of that body to re-district the state after each decennial federal census, or oftener, in order to keep the districts substantially equal in population, thus giving a person's vote substantially as much weight in one part of the state as in another. Unfortunately, there appears to be no way in which the performance of this duty can be enforced by the courts when the legislature refuses or neglects to carry out the constitutional mandate.⁴

¹ For additional facts about the New England system of representation see C. L. Jones, "The Rotten Boroughs of New England," *No. Amer. Rev.*, CXCVII, 486-498 (Apr., 1913); H. E. Deming, "Town Rule in Connecticut," *Polit. Sci. Quar.*, IV, 401-432 (Sept., 1889); G. S. Ford, "Rural Domination of Cities in Connecticut," *Municipal Affairs*, VI, 220-233 (June, 1902).

² Further details may be found in *Ill. Const. Conv. Bull.*, No. 1 (1920), "The Legislative Department"; A. N. Holcombe, *State Government in the United States*, Chap. IX; and W. F. Dodd, *State Government*, Chap. VII.

³ In Texas this last rule is applied only to the senate.

⁴ In Illinois the legislature has failed to obey the constitutional requirements since 1901. If the constitutional rule were observed, Cook county would have been entitled, in 1920, to four additional senators and twelve additional representatives. To grant this increased representation, however, would mean a corresponding reduction of representation from other parts of the state, and

Provisions designed to prevent or counteract any such legislative nullification of the constitution are found in very few states—Ohio, for example, where the governor, auditor, and secretary of state, or any two of them, are empowered to mark out legislative districts in accordance with definite rules set down in the constitution.¹ In Maryland similar power is vested in the governor.

But even where the legislatures live up to the constitution and periodically re-district the state, they do not always act with scrupulous fairness. It not infrequently happens that the dominant party in the legislature indulges in the partisan practice of gerrymandering the state. That is to say, the districts are so marked out as to give that party a fairly safe majority or plurality in as many districts as possible, while the voters of the chief minority party are crowded into as few districts as possible, where they will be in an overwhelming majority. This practice, of course, seriously impairs the representative character of the legislature, for it usually deprives minority parties in most districts of any direct representation in the body which formulates public policy for the entire state.² To check this propensity on the part of legislatures and to limit in other respects their discretion in laying out legislative districts, stringent provisions controlling the apportionment of representation appear in the constitutions of many states. In Illinois, for example, a definite rule is laid down to the effect that the senatorial districts, which are the bases of representation in both houses, shall be formed of contiguous and compact territory, bounded by county lines, and shall contain as nearly as possible an equal number of inhabitants. In some states, notably Wisconsin, Michigan, and Indiana, the courts have been very strict in construing such constitutional limitations and have declared apportionment acts invalid which, in the opinion of the court, did not sufficiently comply with the constitutional requirements. On the other hand, the courts

Gerrymandering

hence reapportionment acts have been defeated repeatedly by the members from those sections. In 1925 a private citizen brought action in the state supreme court praying for a mandamus to compel the legislature to pass a reapportionment act; but the court held that it could exercise no such power. *Fergus v. Marks*, 152 N. E. 557 (1926). For further details on the unfortunate situation in Illinois, see C. M. Kneier, "Chicago Threatens to Revolt," *Nat. Mun. Rev.*, XIV, 600-603 (Oct., 1925); *Amer. Polit. Sci. Rev.*, XXI, 573-576 (Aug., 1927); R. L. Mott, "Reapportionment in Illinois," *ibid.*, XXI, 598-602 (Aug., 1927).

¹A like provision (no longer in force) was invoked in Missouri in April, 1921, and was also included in the proposed Illinois constitution of 1922. See J. M. Mathews, *American State Government*, 155, n.10.

²C. O. Sauer, "Geography and the Gerrymander," *Amer. Polit. Sci. Rev.*, XII, 381-402 (Aug., 1918).

of New York, Illinois, and Kansas have been disinclined to invalidate apportionment acts unless the constitutional requirements appear to have been wholly disregarded.¹

Another undemocratic feature of legislative representation is the frequent discrimination in one or both branches in favor of rural counties against large urban centers, especially in Illinois, Maryland, Missouri, Michigan, New Jersey, New York, Pennsylvania, and Rhode Island. New York City has about fifty-four per cent of the total population of the state, but is allowed only forty-two per cent (63 out of a total of 150) of the seats in the assembly, or lower house; Baltimore, with about half the population of Maryland, has thirty-six out of 118 members of the lower house and six out of twenty-nine senators; Providence, with almost forty per cent of the people of Rhode Island, has only twenty-five representatives out of one hundred, and one senator out of thirty-nine; Chicago, with almost one-half of the population of Illinois, is accorded, under existing arrangements, only about thirty-seven per cent of the members of either house;² and Wayne county (Detroit) has about one-third of the population of Michigan, but only five out of thirty-two senators and fourteen out of one hundred members of the house. This sort of discrimination is not always directed against a single populous city; it frequently happens that the urban districts, taken as a whole, are greatly under-represented in the legislature in comparison with the rural sections. This is especially apt to be the case when every county (or town), irrespective of size, is granted at least one member.

In justification of these and similar discriminations one often hears it said that cities, being industrial centers, are hot-beds of radicalism, while conservatism is found chiefly in agricultural communities; and therefore, in order to check radicalism, the agricultural areas should be given greater proportional representation in the legislature. Besides, there is a prevalent feeling among practi-

¹ P. S. Reinsch, *American Legislatures and Legislative Methods*, 200-213.

² J. M. Mathews, "Municipal Representation in Legislatures," *Nat. Mun. Rev.*, XII, 135-141 (Mar., 1923); O. A. Welsh, "American Rotten Boroughs," *Survey*, LII, 509-513 (Aug. 1, 1924), summarized in *Literary Digest*, LXXXII, Sept. 6, 1924, pp. 14-15; *ibid.*, "Government by Yokel," *Amer. Mercury*, III, 199-205 (Oct., 1924); *ibid.*, "Progressive Hopes and Rotten Boroughs," *Nation*, CXX, 12-14 (Jan. 7, 1925); V. J. West, "California—the Home of the Split Session," *Nat. Mun. Rev.*, XII, 370-372 (July, 1923); S. O. Blythe, "Shall City or Country Rule?" *Country Gentleman*, XCII, 6-7 (Mar., 1927), on the California apportionment legislation of 1927; A. C. Miller, "Curbing a Metropolis in a Constitution," *Amer. Bar Assoc. Jour.*, VII, 17-19 (Jan., 1921).

cally all classes in the less thickly settled portions of the states (that no one county or city should be able to control the legislature, a thing which might easily happen if all portions of the state were represented on a strict population basis. Naturally, this feeling has been capitalized by politicians from the rural districts, who, fearing the domination of the state political organization by the "city crowd," with consequent diminution of their own influence and prestige, seek to check in every possible way the granting of strictly proportioned representation to the urban centers. The discrimination against cities in Delaware and Rhode Island goes far to explain the opposition in the legislatures of those states to all political changes designed to increase the power of the popular majority. For example, direct primaries are opposed in those states because the abandonment of the convention system of making nominations would mean the end of the control of such nominations by the rural districts. The initiative and referendum are similarly objected to because they would nullify rural control of the legislatures.¹

On the other hand, it is argued that to deprive one section of the state of its proportionate representation in the legislature is to violate a fundamental principle of American democracy by substituting minority rule for majority rule; that the trend of American constitutional development from the colonial period to the present has been away from the territorial basis of representation to a population basis, and that such discriminations as remain are merely vestigial appendages; and that those who attempt to justify discriminations on the basis of a distinction between radicalism and conservatism either are ignorant of, or disregard, the fact that some of the most conspicuous of the radical movements in American history—the granger movement, greenbackism, populism, free-silverism, and the more recent Non-Partisan League movement—have had their origin and found their largest number of adherents in the distinctively agricultural sections of the country. As a matter of fact, neither the urban nor the rural sections of the country can justly be charged with being the exclusive habitat of either radicalism or conservatism. Moreover, it should be remembered that the radicalism of yesterday is apt to become the conservatism of tomorrow, and that to check unduly what is regarded by some people as radical today may prove a serious bar to the progress of the state in years to come.

Objections
to it

¹ A. N. Holcombe, *State Government in the United States* (1926), 255, note.

CHAP.
XXXVLegisla-
tures are
fairly rep-
resentative
of social
and
economic
groups

Despite oft-expressed opinions to the contrary, our state legislatures are probably fairly representative of the different social and economic groups contained in the states.¹ Every degree of education is found, and in some legislatures the proportion of members who have had a high school, college, or university education is at times considerably greater than that prevailing among the people generally. Almost every profession is represented, and almost every conceivable business activity, although lawyers and farmers usually outnumber the members of other vocations. "With the farmer sits the artisan, with the banker sits the union labor agitator, with the manufacturer sits the small shopkeeper, with the preacher sits the saloon-keeper, with the professional specialist sits the jack-of-all-trades."

The majority are men in the prime of life, between forty and sixty years of age; although now and then a young man barely a voter, or an octogenarian, appears. Every phase and degree of political experience is also represented: "those who have been only voters, those who make politics a business; those who are ardent partisans, and those who are politically torpid; the conservative and the demagogue—all are intermingled in these representative bodies."² Even foreign-born citizens are well represented.³ And since the adoption of national woman suffrage, women legislators have appeared in increasing numbers. In the elections of 1926 at

¹An interesting study of the personnel of the legislatures of Ohio, Vermont, Indiana, and Missouri some years ago is to be found in S. P. Orth, "Our State Legislatures," *Atlantic Monthly*, XCIV, 728-739 (Dec., 1904), reprinted in P. S. Reinsch, *Readings on American State Government*, 41-56. See also R. Luce, *Legislative Assemblies*, Chaps. XIV-XV; S. A. Rice, "The Behavior of Legislative Groups," *Polit. Sci. Quar.*, XL, 60-72 (Mar., 1925).

²Orth, *op. cit.* In the Illinois house in 1923 there were 45 lawyers, 18 farmers, 14 real estate men, 12 merchants, 18 insurance, or real estate and insurance, men, 6 clerks, 3 bankers, 2 contractors, 2 grain merchants, 2 publishers, 2 manufacturers; and each of the following occupations had one representative: automobiles, barber, broker, bonds and bonding, coal trade, clergy, deputy sheriff, director of amusement company, deputy coroner, hotel proprietor, home-maker, insurance, oil and lumber, iron and steel, journalism, jeweler, lather, lumber, coal and grain, miner, musician and merchant, master painter, motor service, printer, physician and surgeon, retail lumber and manufacturing, "retired," teacher, teaming, undertaker, wholesale hay. The senate consisted of 22 attorneys, 5 farmers, 3 manufacturers, 2 accountants, 2 bankers, 2 druggists 2 merchants, 2 real estate men, and one auctioneer, cabinet-maker, clerk, contractor, journalist, insurance broker, lecturer, miner, physician, salesman, and superintendent. For the occupations represented in the Oregon legislature of 1923 and the Texas legislature of 1921, see *Nat. Mun. Rev.*, XII, 536 (Sept., 1923); *ibid.*, XII, 654 (Nov., 1923).

³The New Mexico legislature in 1923 appropriated nearly \$2,000 to pay translators and interpreters to enable "native" members of the lower house to read bills and debate measures in Spanish. F. Strother, "The Immigration Peril," *World's Work*, XLVI, 632-637 (Oct., 1923).

least ten women were elected to state senates and 98 to membership in lower houses.

CHAP.
XXXV

It cannot be said, however, that all currents of political opinion find representation in our legislative bodies. This defect is due mainly to the fact that, with few exceptions,¹ both senators and members of the lower house are chosen in small, single-member districts, and the candidate who obtains a simple plurality of the popular vote, however small, wins.² This means that large minorities—even majorities, when the votes are divided among the candidates of three or more parties—are left with no spokesman in either house. A remedy for this condition would be some scheme of comparatively large electoral districts, each returning not less than three or five representatives, all elected under an arrangement which will yield each considerable political element representation in fair proportion to its voting strength. This principle of “proportional representation” has already been adopted in Switzerland, Belgium, Denmark, Sweden, the German Reich, Czechoslovakia, Austria, and some parts of the British self-governing dominions;³ and it is receiving steadily increasing attention in the United States, where a few municipalities have brought it into operation.

But not of various currents of political opinion

Proportional representation as a remedy

As now practiced, proportional representation takes two principal forms. One of them, called the Hare system—a combination of preferential voting and proportional representation—has been adopted for the election of members of the city council in Ashtabula, Cleveland, and Cincinnati (O.), Boulder (Col.), Kalamazoo (Mich.), Sacramento (Cal.), and a few Canadian cities.⁴ In 1920,

1. The Hare system

¹ In Ohio, when a county is entitled to more than one senator or representative the entire number is elected at large. A similar rule prevails in Wyoming. On the unique Illinois system, see J. M. Mathews, *American State Government*, 167-168.

² In Vermont an absolute majority of all votes is required to elect. This often results in prolonged balloting, extending over several days.

³ F. A. Ogg, *The Governments of Europe* (rev. ed.), 421-422. The best books on proportional representation are J. R. Commons, *Proportional Representation* (2nd ed., New York, 1907), J. H. Humphreys, *Proportional Representation* (London, 1911), and C. G. Hoag and G. H. Hallett, Jr., *Proportional Representation* (New York, 1926). The files of the *Proportional Representation Review*, the organ of the American Proportional Representation League, contain lucid expositions of the different forms which the system takes. For criticisms of proportional representation, see G. Horwill, *Proportional Representation, Its Dangers and Defects* (London, 1925); H. G. James, “Proportional Representation—A Fundamental or a Fad?” *Nat. Mun. Rev.*, V, 266-272 (Apr., 1916).

⁴ Short articles describing the workings of the Hare system in American cities may be found in *Nat. Mun. Rev.*, V, 56-65 (Jan., 1916); V, 87-90 (Jan., 1917); VII, 27-35 (Jan., 1918); VII, 339-348 (July, 1918); IX, 9-12 (Jan., 1920); IX, 84-92 (Feb., 1920); IX, 408-410 (July, 1920); X, 411-413 (Aug., 1921); XIII, 72-77 (Jan., 1924); XIV, 589-594 (Oct., 1925); XV, 651-660

however, the Michigan supreme court declared the proportional representation feature of the Kalamazoo charter unconstitutional, and in 1922 the Sacramento charter provision was similarly invalidated by a California court decision.¹ The other plan is called the list system. If either were to be generally adopted for the election of members of the state legislatures, the present small single-member districts would give way to fewer large districts, each electing perhaps from five to ten representatives. Under the Hare system each voter would indicate on the ballot the order of his preference among the various candidates whose names appeared thereon. This mere preferential-voting arrangement is now in use in more than fifty cities in this country for the election of city officials. The proportional feature appears in the method of determining the result of the election, and it has not been so widely adopted. If employed, it would mean that after all the ballots have been sorted according to the indicated first preferences, the total number of valid ballots would be divided by the number of seats to be filled plus one, and the quotient would become the electoral quota which each candidate must receive in order to be elected. Any candidates who were found to have received a number of votes equal to the electoral quota would be declared elected. If any of these candidates received votes in excess of the quota, these votes would be distributed among the remaining candidates in accordance with the second choices indicated on the surplus ballots. If, with these additions to his first-choice votes, any candidate should obtain a number equal to the quota, he would be declared elected, any surplus votes again being distributed among the remaining candidates in accordance with indicated second choices. If no one should receive the quota as a result of distributing the surplus votes, the candidate standing lowest would be eliminated, and his ballots distributed among the other candidates in accordance with indicated second choices. This process of distributing surplus votes and eliminating candidates with the smallest votes in successive countings would be continued until as many candidates obtained the required quota as there were places to be filled. If, however, a point should be reached where there were no more

(Nov., 1926); *Polit. Sci. Quar.*, XXXVIII, 652-659 (Dec., 1923). This system was also used in the city of Winnipeg for the election of ten members to the provincial parliament of Manitoba in 1920. Its operation in that election is described by O. E. McGillicuddy, *New Republic*, XXIII, 44-45 (Sept. 8, 1920), and by D. B. Harkness, *Nat. Mun. Rev.*, IX, 695-696 (Nov., 1920).

¹See W. Anderson, "The Constitutionality of Proportional Representation," *Nat. Mun. Rev.*, Supplement, XII, 745-762 (Dec., 1923).

candidates left than there were seats to be filled, the surviving candidates would be declared elected, even though some of them fell short of the electoral quota.¹

The list system would undoubtedly appeal more strongly to practical politicians in our country, inasmuch as under it parties are enabled to play a larger rôle in determining the result of an election. Under this plan, which, with some variations, is now in operation in Belgium, Germany, Austria, and several other countries, each organized group of voters nominates a "ticket," or list of candidates, usually equal in number to the number of representatives to which the district is entitled. The number of seats obtained by each party is determined by the proportion which the number of votes cast for each party ticket bears to the total number of votes cast in the district. The order in which the names in each list appear on the ballot affects the result and is determined by the party managers; unless the voters indicate a different preference, that order is followed in the assignment of the seats to which each ticket is entitled. If, however, a ticket should be entitled to four representatives, and a candidate whose name stood sixth on the list as made up by the party leaders should receive more votes than one of the first four, he would be declared elected in place of the lowest candidate among the first four.

The actual operation of the list system may be illustrated by the following hypothetical case. Assume that a state has been divided into half a dozen large districts in each of which ten representatives are to be elected; that five parties are competing for these seats; and that the total vote cast in a given district is 100,000. The first thing to do is to ascertain the electoral quota. This is done by dividing the total vote received by each ticket or list successively as follows:

	Republican	Democrat	Socialist	Farmer-Labor	Prohibitionist
Divide by 1....	30,000	25,000	20,000	15,000	10,000
Divide by 2....	15,000	12,500	10,000	7,500	5,000
Divide by 3....	10,000	8,333	6,666	5,000	3,333

Next, the ten highest quotients thus obtained are arranged in order, beginning with the highest; and the tenth quotient, 8,333, becomes the electoral quota, or the number of votes which each

¹ The Model State Constitution of the National Municipal League (1921) provides for the election of the legislature by the Hare system of proportional representation (§ 13).

ticket must have in order to be entitled to one representative. Dividing the total vote cast for the Republican ticket by 8,333 gives three, the number of representatives to which that party is entitled; and the first three names on the Republican list would ordinarily be declared elected. Applying the same method to the votes cast for other party tickets, we obtain, as the final result, the election of three Republicans, three Democrats, two Socialists, one Farmer-Laborite, and one Prohibitionist.

Each considerable group of voters in the district would thus receive representation in the law-making body nearly in proportion to its voting strength. On the other hand, the ordinary general ticket system, such as we use in presidential elections, would have given the entire delegation to the Republicans. Proportional representation unquestionably produces a legislative body which more truly reflects all the important currents of political opinion than does the small, single-member district, electing under the plurality vote; and it hardly requires argument that a body whose main business is the translation of public opinion into law ought to be of this broadly representative character.

REFERENCES

- W. F. Dodd, *State Government* (New York, 1922), Chap. VII.
 J. M. Mathews, *American State Government* (New York, 1924), Chaps. VI, VII.
 R. Luce, *Legislative Assemblies* (Boston, 1924), Chaps. II, V, XIV-XVI.
 P. S. Reinsch, *American Legislatures and Legislative Methods* (New York, 1907), Chap. VI.
 S. A. Rice, "Farmers and Workers in American Politics," *Columbia Univ. Studies in Hist., Econ., and Public Law CXIII*, 327-551, especially Chap. VI.
 A. N. Holcombe, *State Government in the United States* (2nd ed., New York, 1926), Chap. IX.
 J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chap. XL.
 E. Kimball, *State and Municipal Government in the United States*, Chap. X.
 A. Z. Reed, "The Territorial Basis of Government under State Constitutions," *Columbia Univ. Studies in Hist., Econ., and Public Law*, XL, Chaps. VII-VIII (New York, 1911).
 G. H. Sabine, "What is the Matter with Representative Government?" *No. Amer. Rev.*, CCXIII, 587-597 (May, 1921).
 D. P. Barrows, "Legislative Failure and Reform," *California Law Rev.*, V, 129-142 (Jan., 1917).
 W. D. Hines, "Our Irresponsible State Governments," *Atlantic Monthly*, CXV, 634-647 (May, 1915).
 C. E. Daggett, "Unicameral Legislatures," *Cornell Law Quar.*, V, 285-301 (Mar., 1920).

THE LEGISLATURE: STRUCTURE AND COMPOSITION 691

- G. M. Wrong, "Our Legislative Mills: A Contrast—the Single-House Legislature of Ontario," *Nat. Mun. Rev.*, XIII, 169-172 (Mar., 1924). CHAP.
XXXV
- A. B. Clark, "The Single-Chamber Legislature of Manitoba," *Nat. Mun. Rev.*, 225-233 (Apr., 1924).
- National Municipal League, *A Model State Constitution* (1921).

CHAPTER XXXVI

THE LEGISLATURE: POWERS AND LIMITATIONS

The legislature as the central power-house of the state governmental system

From the state legislature, as from a great power-station, emanates the energy which sets in motion and drives most of the machinery, not only of the state government, but of the county, municipal, and other local governments as well. As has been pointed out, the legislature almost universally plays a leading part in the process of amending both the national and state constitutions; this, however, is only an occasional function, and accordingly one that may fairly be rated as of minor importance. The most conspicuous and far-reaching of the legislature's energizing powers run in other channels. The state constitution creates numerous executive and administrative offices and to some extent prescribes their functions; it establishes courts and to some extent defines their jurisdiction; it provides for certain organs of county and local government and to some extent outlines their powers and duties. But the articles which relate to these several phases of state and local government are seldom self-executing; they usually require supplementary legislation. Administrative officials, for example, have little to do until the legislature enacts laws for them to administer; the courts cannot adjudicate the rights of individuals, save as these rights may be based upon the common law, until the legislature defines them; county, city, and other local government units are intimately dependent upon the legislature and cannot function until that body has enacted numerous necessary laws.

Laws making constitutional provisions effective

The legislature completes the judicial and local organization of the state; regulates, wholly or in part, the jurisdiction and procedure of the various state and local courts; defines crimes and their punishment; determines, within certain limitations, the civil rights of citizens; regulates the ownership, use, and disposition of property, the making and enforcement of contracts, the conduct of professions and of many business and industrial enterprises, especially those carried on by corporations; enacts laws affecting the relations of husband and wife, and the other domes-

tie relations; provides for a system of free public schools, and for charitable and penal institutions; regulates primaries, elections, and the organization and operations of political parties; passes acts which restrict rights of liberty and property in the interest of public health, morals, safety, and the general welfare; authorizes taxation for the support of state and local governments; appropriates definite sums to be expended by each department or activity of the state government; and authorizes the incurring of indebtedness by both state and local governments.¹

This enumeration merely suggests the scope, variety, and importance of state legislative activities. Nevertheless, one may pore over one's state constitution from beginning to end without discovering any such list of legislative powers as that just given. For, unlike Congress, the state legislature possesses all legislative power not granted elsewhere or prohibited to the states by the national constitution, and not expressly or impliedly withheld by the state constitution; and no comprehensive enumeration of its powers is ever attempted. One will, of course, come across clauses in almost every constitution which expressly confer certain specific powers on the legislature; and these direct grants of authority are, as a rule, not merely superfluous. In many instances they have become necessary in order to offset the effect of court decisions in interpreting certain general phrases in the constitution, such as "due process of law;" and again they have been inserted as a precaution against a possible future judicial denial of power to the legislature in the matters with which they deal. Outside of cases of this kind, however, the powers of the legislature are seldom specified; as a part of the general powers of the state, they are residual and unenumerated.

One of the so-called residual and inherent powers possessed by our state legislatures deserves special emphasis, namely, the police

CHAP.
XXXVI

No detailed
enumera-
tion of the
powers of
the legisla-
ture

¹In addition to strictly legislative functions, certain non-legislative functions are assigned to the legislature in every state. For example, the consent of the senate is required for the appointment of certain officers appointed by the governor and sometimes for their removal as well; the judges of the highest state court, and sometimes of inferior courts, are chosen by the legislature in Vermont, Rhode Island, Virginia, and South Carolina; in about one-third of the states judges of the state courts may be removed by a vote of the two houses of the legislature; impeachment proceedings originate in one branch of the legislature and are generally tried by the other, although judges of some of the highest courts may be added, as in New York; in some states the legislature also appoints some of the county and town officers, and takes part in the appropriation of town and county funds; and in a number of states the legislature serves as a canvassing board in connection with the election of certain state officers.

power. This is the power that enables the legislature to pass laws for the protection of the public health, morals, and safety, or laws which are otherwise very clearly for the general welfare. In exercising this important power the legislature may restrict the ordinary rights of liberty and property enjoyed by the individual in almost any manner and to almost any degree, so long as the Supreme Court of the United States is satisfied that such restrictions do not amount to a deprivation of life, liberty, or property without due process of law, which is prohibited by the Fourteenth Amendment. Statutes based upon the police power have multiplied in recent decades until they have become almost legion, and the end is not in sight. Only the briefest possible enumeration of such enactments can be presented here, but it may convey some idea of the comprehensiveness of the power under consideration. Until recently, all state laws regulating the manufacture and sale of intoxicating liquor were based on the police power. This is true today of laws regulating the manufacture, sale, and use of explosives, fire-works, and fire-arms. Laws for the suppression of lotteries, gambling, vice, and immoral entertainments are obviously designed to protect the public morals. Practically every state also has laws regulating various trades, industries, and professions; laws for the protection of fish and game, and for the conservation of other natural resources; pure food and drug laws; laws authorizing quarantine and other health regulations; laws regulating the services, charges, and sometimes the stock-issues, of public utility corporations. Another very important class of regulations enacted under the police power includes those requiring the owners of mines and manufacturing and mercantile establishments to provide suitable protection for the health and safety of their employees and to grant them compensation when injured in their service. Closely related are laws which restrict hours of labor for women and children, and in certain occupations, for men as well. Lastly, under the police power the legislature is able to authorize cities and other municipal corporations to suppress nuisances, to enact health, building, zoning, billboard, traffic, and a multitude of other ordinances, as well as to provide in still further ways for the protection of the life and property of their inhabitants.¹

Despite the fact that the legislature is an exceedingly impor-

¹ T. R. Powell, "The Police Power in American Constitutional Law," *Jour. Compar. Legis.*, 3rd series, I, Pt. 3, 160-174 (Oct., 1919).

tant and useful organ in every state government, it is looked upon by people generally as more or less of a necessary evil, which ought to be curbed and checked at every possible point; and constitution-makers have themselves commonly shared this view. Admittedly the history of American state legislatures contains much to account for, if not to justify, the current notion that they are inefficient and untrustworthy bodies; and practically every constitution adopted since the early nineteenth century has testified, in the number and variety of the restrictions imposed upon the legislature's activities, to the unfortunate experiences of the past. These restrictions have, in some instances, only aggravated the former difficulties; in others, they have even raised up new ones. Many such limitations have served their purpose, have outlived their usefulness; or else they are futile, either because of the ease with which they can be evaded or because they do not go to the root of the evils which they were designed to eradicate. Because of the sins of the past generations of lawmakers, many unoffending legislatures are today so hobbled and shackled as not only to prevent them from doing serious harm, but also to make it impossible for them to accomplish the good which otherwise might result from their work.¹

CHAP.
XXXVI
Suspicious
attitude
toward
legislatures

In the earliest state constitutions practically no limitations were placed upon legislative activity other than those contained in the bill of rights; on the other hand, those documents furnish abundant evidence of the high popular esteem in which the legislature was then held. For example, in many states the legislature elected the governor, other important executive officers, and also the judges of the courts. Furthermore, in only three states (New York, Massachusetts, and South Carolina) was a veto upon legislation conferred upon the governor or some other authority. In the state constitutions of today these conditions are almost completely reversed everywhere outside of New England, where, with the exception of a few restrictions on financial powers and some general directions to provide for education and the militia, the legislatures retain almost all of their early freedom. In the newer constitutions, especially in the West and South, one finds, in addition to the

Absence of
restrictions
in earlier
times

Indirect
restrictions

¹ Most of the express restrictions upon the states found in the national constitution (Article I, § 10 and the Fourteenth Amendment), together with the implied limitations on the power of the states over foreign and interstate commerce and bankruptcy, are, in practical operation, primarily restrictions upon the state legislatures. See above pp. 143-152, 173-177; also W. F. Dodd, *State Government*, Chap. VI; J. D. Barnett, "The Delegation of Legislative Power to the States," *Amer. Polit. Sci. Rev.*, II, 347-377 (May, 1908).

provisions of the bill of rights guaranteeing fundamental personal and property rights against legislative impairment, an impressive array of specific limitations on legislative activity. A veto on legislation has also been given to the governor in every state except North Carolina; and in a few states the veto may be applied to a part, or to parts, as well as to the whole, of any legislative measure.¹

Other limitations are to be found in constitutional provisions which specify the number, method of selection, duties, and powers of important state and county officers—provisions which sometimes go so far as to fix salaries and frequently prescribe the method of compensation and the length of the term of office. Such matters are thereby placed almost entirely beyond the power of the legislature to change; whence it comes about that short-ballot reform through legislative action alone is usually made totally impossible. Similarly, the amplification of state constitutions by the inclusion of detailed provisions relating to a large number of subjects over which the legislature at one time had jurisdiction removes those subjects, at least in part, from the sphere of legitimate legislative action; it so removes them altogether in states where the courts have most fully applied the doctrine of implied or resulting limitations.

Narrow
judicial
construc-
tion of
restrictions

In some states this legal doctrine has even been applied to *express grants* of power to the legislature, thus still further curtailing the activity of that body when no such effect had been contemplated or intended by the constitution-makers. Nebraska furnishes a conspicuous illustration of this sort of narrow constitutional interpretation. The Nebraska constitution of 1876 provides that the legislature shall have authority to establish reform schools for children *under sixteen years of age*; and the courts have construed this as restricting the legislature to the establishment of reform schools for such persons only; and as preventing it from establishing such schools for persons over the age mentioned.² Many other state courts take the view that *every* provision of a state constitution should be construed as limiting legislative power to the greatest possible extent. The result in probably a majority of the states is that, whereas in theory the legislature has all legislative power not denied to it by the terms of the national and state constitutions, in practice it has tended to become merely a

¹ See Chap. xxxviii, where it is explained that in all but ten of the states the governor may veto separate items in appropriation bills.

² In 1920 a constitutional amendment raised this age limit to eighteen years.

body of strictly delegated powers, much like the municipal council described in a later chapter.¹ Few factors have contributed more to deaden popular interest in the work of the legislature and to deprive the state of the services of its best qualified citizens than this shrivelling of legislative power through express constitutional restrictions, reinforced by narrow judicial canons of interpretation.² This tendency on the part of the courts might to some extent be checked, remedied, or counteracted by formulating in the constitution itself a new rule of judicial construction which would at least make it easier for judges to adopt a more liberal view of legislative powers. The Oklahoma constitution of 1907, in point of fact, does seek to prevent the drawing of implied limitations from provisions not intended as such, by declaring that "the authority of the legislature shall extend to all rightful subjects of legislation, and any specific grant of authority in this constitution upon any subject whatsoever shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever."³

CHAP.
XXXVI

Most other constitutional limitations on the legislature relate to (1) financial powers, (2) the enactment of special, local, or private laws, (3) legislative procedure and the form in which bills must be enacted, (4) the frequency and length of legislative sessions, and (5) the use of the initiative and referendum.

Direct
restrictions:

Among financial limitations, one finds sections requiring all taxation to be uniform upon all kinds of real and personal property according to valuation, or else permitting classification of different kinds of property and requiring that the rate of taxation shall be uniform within each class; clauses forbidding the legislature to exempt counties, or other local governments, from their share of the state taxes, or to exempt persons or corporations from taxation; clauses prohibiting the appropriation of money to private or sectarian schools, or to religious institutions, and excluding all other subjects from bills appropriating money for the the payment of members and employees of the legislature and

1. Financial
powers

¹ See Chap. XLVI.

² For an excellent discussion of the powers of the state legislature as affected by judicial canons of construction, see *Ill. Const. Conv. Bull.*, No. 8 (1920), "The Legislative Department," 578-587; E. Freund, "The Problem of Adequate Legislative Power under State Constitutions," *Acad. of Polit. Sci. Proceedings*, V, 98-126 (1914); W. F. Dodd, "The Functions of a State Constitution," *Polit. Sci. Quar.*, XXX, 201-221 (July, 1915).

³ See in this connection Professor Freund's suggested remedy, in *Acad. of Polit. Sci. Proceedings*, V, 125 (1914).

(a) general

the salaries of state officers; sections limiting the period for which appropriations may be made, and prohibiting extra compensation to any public officer, agent, or contractor, or the payment of any claim against the state not expressly authorized by law. All but three states (Connecticut, New Hampshire, and Vermont) prohibit the loan or pledge of state credit to private enterprises or to local governments, or to both; they also forbid the state to subscribe to the stock of private corporations, or to assume the liabilities of individuals, associations, or corporations (and of local governments as well, in about one-third of the states) unless these liabilities have been incurred in repelling invasion. Some constitutions specifically mention railroads, canals, and telegraph companies as coming within the foregoing inhibition.

(b) indebtedness

Especially important are the constitutional limitations on the power of the legislature to incur indebtedness.¹ These, as well as some of the restrictions just mentioned, have grown out of the reckless extravagance with which many legislatures, during the second quarter of the past century and in the Reconstruction period in the southern states, poured money into works of internal improvement, such as turnpikes, canals, and railroads, and also involved their states in the banking business. Most states now permit legislatures to authorize loans in only comparatively small amounts and only in order to meet casual deficits or temporary emergencies. The amounts thus permitted range from fifty thousand dollars in Maryland and Rhode Island to two millions in Idaho, the usual figure being five hundred thousand dollars or less. Furthermore, special conditions are sometimes imposed on borrowing; for example, the making of adequate provision by law for a tax to cover the interest and principal, or requiring repayment within a specified period, or making it necessary to obtain a two-thirds or three-fourths vote of all members of the legislature. Indebtedness in excess of the constitutional limit may be incurred in about one-third of the states, provided the action of the legislature authorizing the debt is approved in a popular referendum. In more than half of the states, counties, cities, and other local governments are similarly subject to constitutional debt limitations, and the legislature is therefore incapable of extending their borrowing powers.

Maryland and New York have recently adopted constitutional

¹See *Ill. Const. Conv. Bull.*, No. 4 (1920), "State and Local Taxation," 247-262, 288-303.

amendments which materially restrict the freedom of the legislature in making appropriations. The budget of state expenditures is prepared by the governor and is then submitted to the legislature, whose right to make changes in the governor's financial program has been sharply curtailed. In most states, however, the legislature has practically a free hand in appropriating the state's revenues.¹ Lastly, in all but ten of the states the governor has been given the right to veto, or to reduce, separate items in appropriation bills, as a further means of checking legislative extravagance. Inasmuch as the legislature is seldom able to overcome an executive veto or alteration, this device proves very effective.

CHAP.
XXXVI
(c) appro-
priations

Another class of restrictions has to do with "class legislation" and with local, special, or private laws, *i.e.*, laws which apply to, or are for the benefit of, some particular person, corporation, or locality, or which are not of general and uniform application throughout the state, or which do not apply to all persons or corporations included in some authorized classification. The control of special legislation is one of the most difficult problems that have confronted constitution-makers. Without some restriction, there is a wide field for favoritism and corruption, and much of the time of the legislature is likely to be frittered away in the consideration of petty matters.² As a result of the evils arising in many states from lack of restraints at this point, most constitutions now contain provisions which are designed to prevent special legislation, or at all events to restrict the number and variety of special or local laws that can be enacted. "For the present at least, constitutional limitations on special legislation are an important and growing part of our fundamental laws. Though they are admittedly subject to serious objections in theory, there can be no doubt that they

2. Special
legislation

¹ For more details of the Maryland budget system, see H. S. Chase, "The Budget Amendment to the Maryland Constitution," *Nat. Mun. Rev.*, VI, 395-398 (May, 1917); and A. E. Buck, "Operation of the Maryland Budget," in *Amer. Polit. Sci. Rev.*, XII, 514-521 (Aug., 1918).

² In Illinois between 1862 and 1870 "the private and special legislation evil grew to such proportions that practically the entire time of the General Assembly was devoted to the enactment of private and special laws, while measures of public interest were in many instances stifled or passed without due consideration." *Constitutional Conventions in Illinois* (Springfield, 1920), 21. At the present time North Carolina probably furnishes the worst example of practically unrestricted legislative freedom in enacting local or special laws. See C. L. Jones, *Statute Law-Making in the United States*, 39-40; H. R. Trusler, "Hasty and Local Legislation," *Amer. Law Rev.*, LX, 362-373 (May-June, 1926); *Massachusetts Const. Conv. Bulletin* No. 34, "Special Legislation" (1918). Illustrations of special legislation relating to municipal government will be found in Chap. XLV below, and *Nat. Mun. Rev.*, XIII, 45-46 (Jan., 1924).

have been a valuable protection under conditions which have heretofore surrounded the American legislature.”

The most common ways in which state constitutions today deal with the problem of special legislation are (1) to prohibit special, local, or private laws on any matters and in all cases which can be covered by a general law;¹ (2) to require that all general laws or laws of a public nature be uniform in their operation throughout the state; and (3) to list, in the constitution itself, the subjects which may not be dealt with in special or local laws. Thus we find legislatures expressly forbidden to pass special laws granting divorces; changing the names of persons and places; laying out or altering highways; vacating roads, streets, and public grounds; locating or changing county seats; regulating county and township affairs; providing for changes of venue in civil and criminal cases; regulating the rate of interest on money; chartering or licensing ferries or toll-bridges; regulating elections; remitting fines, penalties, and forfeitures; changing the law of descent; granting or amending corporate charters; and granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise. In many instances these restrictions have had a very salutary effect; nevertheless, a great amount of special legislation continues to be enacted, for legislatures have found ingenious ways of evading them. The legislatures, however, are not wholly to blame; much special legislation is needed in order to deal satisfactorily with peculiar local problems, and much is enacted at the behest of, and because of the importunities of, the people of some locality or of representatives of some special interest.

Ineffective-
ness of
these limi-
tations

The growing complexity of legislative problems and the diversity of local needs seems, indeed, to warrant some relaxation in the rules restricting special legislation.² But no really effective mode of properly safeguarding the public interest, while at the same time permitting a reasonable degree of freedom of action to the legislature, has yet been devised. Perhaps a plan embodied in the Michigan constitution of 1908 comes nearest to being a satisfactory solution. Under it, the legislature is prohibited from passing any local or special act in any case where a general law can be made applicable; and whether a general act can be made ap-

¹ Where the state courts hold that the legislature is the sole judge whether a given case can be covered in a general law, this kind of restriction has proved very ineffective.

² C. L. Jones, *Statute Law-Making*, 43.

pliable is for the courts to decide, rather than the legislature itself, as is the practice in many states.¹ Furthermore, local or special laws must receive a two-thirds vote in both houses of the legislature, and are not to take effect until approved by a majority of the electors voting thereon in the district to be affected.

CHAP.
XXXVI

The constitutional limitations relating to legislative procedure and to the form in which bills are passed are designed for the most part to guard against surprise, to secure reasonable deliberation and publicity, and to ensure, in some degree, a sense of responsibility on the part of the law-makers.² Among the restrictions belonging to this general class are clauses requiring (a) that all bills and their amendments be printed a certain number of days before final action is taken, although very often the rule is not observed in practice; (b) that every bill be read at large or at length on three different days, although where all bills have to be printed this serves no useful purpose, consumes a large amount of time if observed, and in actual practice is commonly disregarded; (c) that a yea and nay vote be taken on the passage of all measures, a rule which is also frequently disregarded in practice;³ (d) that no act embrace more than one subject, which shall be clearly indicated in the title; and (e) that statutes be not amended or revived by reference merely, but rather that all portions amended or revived be included in full.

3. Pro-
cedure

In Illinois this last requirement, through judicial construction, has resulted in nullifying laws not expressly amending former acts but so altering the effect of a previous law that the two acts have had to be read together in order to find the law upon the subject. This rule—which has been followed by the state supreme court since 1900—gives the court the very great power of determining in each case whether an act is sufficiently independent of previous legislation to be upheld as an independent statute or whether it so affects previous legislation as to amount to an amendment thereof, in which case the act comes within the constitutional requirement relating to amendments. "With the large mass of statutes in force at any given time, it is possible to hold that practically any new piece of legislation is amendatory of earlier

¹ A similar restriction exists in Alabama, Kansas, Minnesota, and Missouri.

² P. S. Reinsch, *American Legislatures and Legislative Methods*, 134 ff.

³ To save a large amount of time consumed in roll-calls for yea and nay votes, Wisconsin, Iowa, and Texas have installed a system of electrical voting. See "A Machine Vote" in *Literary Digest*, LIV, May 12, 1917, p. 1407, and E. B. Rodriguez, "Electric Voting in the Wisconsin Legislature," in *Nat. Mun. Rev.*, VIII, 404-405 (Aug., 1919).

legislation, and with no definite principles laid down for the guidance of the general assembly . . . the rule sets up practically a guessing contest between the general assembly and the supreme court in which the supreme court has the last guess." Such a result was, in all probability, neither foreseen nor intended by the framers of the Illinois constitution.¹

By reason of the foregoing, and numerous other, limitations directly or indirectly placed upon legislative procedure—some of which, as in Illinois, have been enlarged by judicial construction—pitfalls exist in almost every direction, and some of them may easily be overlooked in the most carefully planned legislation. Not without reason has legislation been characterized as a hazardous occupation.

4. Frequency and duration of legislative sessions

In early days it was customary to provide for annual elections and for annual sessions of the legislature, but at the present time, legislators are elected every year only in New York and New Jersey; and only four states (Massachusetts, New Jersey, New York, and Rhode Island)² have annual legislative sessions. In forty-three states sessions are biennial, with the provision that special sessions may be called at any time; in Alabama the regular sessions are held quadrennially. About three-fourths of the states now limit, in one way or another, the period during which the legislature may sit. These periods vary from forty days in Wyoming to five months in Connecticut; the most common limit is sixty days or thereabouts, which is the rule in some twenty states. In a few other states there is no absolute limitation, but after the expiration of a certain period the legislators receive reduced pay.

These restrictions arise from a desire to compel legislators to perform their work with despatch, and from a hope of reducing the quantity of poor legislation and of saving the state from evils of over-legislation generally. It has been thought that, with less frequent sessions, subjects of major importance would absorb the interest of the legislators and tend to crowd out trivial matters or matters of merely personal or local interest; that, at all events, with the length of these sessions definitely limited, the amount of poor legislation would be proportionally reduced; and that, meeting more rarely, the legislature would attract greater public

¹*Ill. Const. Conv. Bull.*, No. 8 (1920), "The Legislative Department," 558.

²In 1924 Georgia and South Carolina voted to adopt biennial sessions.

attention and thus become a more inviting field of activity for men of ability. But extended experience with these limitations has clearly and repeatedly demonstrated their futility. When public opinion demands legislation and the time in which to enact it is definitely limited, the effort will be made to crowd it all into the allotted time. This practice goes far toward explaining the crude form and ill-digested character of many measures that get on the statute books. Furthermore, on the more contentious subjects, the legislature is tempted to abdicate its responsibility by passing inadequately considered bills, leaving it to the governor to decide whether they shall become laws.¹ Indiana furnishes a good illustration in point. Legislative sessions are there limited to sixty-one days, including holidays and Sundays. The routine work of organization consumes some time, and only from forty to forty-five days are actually available for the consideration of bills. A former legislative reference librarian in that state,² describing the session of 1917, testifies as follows concerning the effects of this constitutional restriction:

"It is utterly impossible to do the work in sixty-one days. The best intentioned legislature in the world could not do the job in sixty-one days, even if it were not harassed by the job-hunters, peanut politicians, and self-serving lobbyists. To continue to try to do the work in sixty-one days is to continue to play directly into the hands of the people who profit by confusion. One hundred and fifty laws were dumped on the desk of the governor during the last two days of the session. Prior to that time, fewer than sixty had been sent to him. In the closing days, therefore, three-fourths of the legislation of the session was enacted, and in what horrible confusion! The last night of the session members could be found enrolling their own bills in any part of the capitol in order to get them signed by the presiding officer before adjournment. What a splendid chance to slip jokers into bills! What a splendid opportunity for the clever gentlemen who knew exactly what they wanted! In this confusion many good laws came through in such shape as to render them invalid."³

The wide adoption of the initiative and referendum in connection with ordinary state legislation furnishes another conspicuous illustration of the lack of popular confidence in representative

CHAP.
XXXVI

Objections
to the
limited
session

5. Initiative and
referendum

¹ C. L. Jones, *Statute Law-Making*, 13-14.

² Mr. John A. Lapp.

³ See also R. Luce, *Legislative Assemblies*, Chap. VII.

law-making bodies. When these modes of "direct legislation" are employed, the final decision as to what shall or shall not become law (so far as the law-making process is concerned) is taken away from the legislature and reserved to the people or the electorate. In spite of frequent assertions to the contrary, the adoption of the initiative and referendum has nowhere in this country been due to any general desire to do away with our traditional representative legislative bodies and to substitute law-making directly by the electorate. It has always been assumed that the great mass of legislation would continue to be enacted by the legislature as formerly; and in practice this has proved to be the case. The adoption of the initiative and referendum has simply meant that the electorate has deemed it necessary, in view of unfortunate experiences, to provide itself with additional checks upon the work of the legislature, whereby, if that body fails to enact laws that are needed or desirable, the people may obtain them by direct action under the initiative; or, when the legislature has enacted laws that meet popular disapproval, the electorate may veto them in a popular referendum. In other words, the initiative and referendum are not designed for frequent use, but rather to serve as "a gun behind the door;" if seldom called into play, the presumption is that the legislature is doing its work satisfactorily.

Spread of
the initia-
tive and
referendum

South Dakota, in 1898, became the first state to adopt the initiative and referendum for ordinary legislation; and since that date nineteen other states have taken a similar step, the last one to do so being Massachusetts, in 1918. In addition to these states, Maryland and New Mexico have the referendum only. In Idaho, however, no law has been enacted to carry out the direct-legislation amendment adopted in 1912; and in Mississippi the amendment authorizing the initiative and referendum was declared invalid in 1922 by the state supreme court.¹ So the system is actually in operation in only twenty states at the present time (1928). Elsewhere, however, the question of adopting it has been under dis-

¹The complete list of states is as follows: South Dakota (1898), Utah (1900, 1917), Oregon (1902), Nevada (1904), Montana (1906), Oklahoma (1907), Maine (1908), Missouri (1908), Michigan (1908), Arkansas (1910), Colorado (1910), California (1911), New Mexico (1911), Arizona (1911), Idaho (1912), Ohio (1912), Nebraska (1912), Washington (1912), Mississippi (1914), North Dakota (1914), Maryland (1915), Massachusetts (1918). An interesting account of instances of the initiative and referendum in colonial New England is K. Colegrove, "New England Town Mandates," *Colonial Soc. Mass. Publications*, XXI, 411-449 (1920).

cussion in recent years, notably in Illinois, where it has been repeatedly endorsed by large popular majorities.¹

CHAP.
XXXVI

The initiative and referendum laws now in force differ considerably,² yet a general characterization of them is not difficult. In the first place, it should be noted that referenda may be either optional or obligatory. An optional referendum takes place when the legislature, desiring to obtain an expression of popular sentiment upon a certain measure, provides that the measure shall not go into effect until it shall have been approved by the voters at an election; or the legislature may leave different districts or counties to determine, each for itself, whether a certain law shall apply to them. This use of the referendum was not uncommon before 1898. The initiative and referendum which we are here considering, however, are of the obligatory or mandatory type, and do not depend upon the will of the legislature. When this form exists, legal provision is usually made for suspending all ordinary legislative enactments for a certain period, usually ninety days from the date of their passage.³ During this interval the people of the state have an opportunity to scrutinize the work of their law-makers; and if a stated number or percentage of voters agree that a given act is undesirable, they can, by filing a petition, prevent that act from taking effect until it has been submitted to the people and ratified by popular vote.⁴

Forms of
the refer-
endum

The initiative may be invoked whenever any considerable number of people believe that the legislature has failed to enact necessary and desirable laws. A citizen or group of citizens may, with or without the assistance of lawyers, draw up a bill designed to meet a recognized need. This done, the next step is to obtain the signature of a specified number of voters to a petition requesting that the bill be enacted into law. The petition is filed with the

Procedure
under the
initiative

¹ The initiative and referendum for city ordinances is authorized in almost all commission-governed cities, including those in Illinois.

² Various initiative and referendum laws will be found in C. A. Beard and B. E. Shultz, *Documents on the State-Wide Initiative, Referendum, and Recall* (New York, 1912). Cf. *Ill. Const. Conv. Bull.*, No. 2, "The Initiative, Referendum, and Recall" (Springfield, 1920); *Mass. Const. Conv. Bull.*, No. 6, "The Initiative and Referendum" (Boston, 1917).

³ In Massachusetts, 15,000 signatures are required for a referendum petition in order to suspend the operation of an act, whereas only 10,000 are required for a referendum without suspension.

⁴ Certain measures, designated as emergency acts, are often exempted from the referendum. In some states it has been possible to prevent referendum on measures by inserting therein a clause declaring them to be emergency measures, when clearly no emergency existed. To put a stop to this abuse, Oregon, in 1921, adopted an amendment authorizing the governor to veto the emergency clause in any measure whenever, in his judgment, no emergency existed.

proper authority, and then either one of two courses is taken, according as the law of the state prescribes. One is called the direct initiative; the other, the indirect initiative. Under the direct initiative, the proposed measure is submitted to the people at the next regular election, or at a special election, without being previously submitted to the legislature. Under the indirect initiative, the bill must be submitted to the legislature at its next session, and if that body acts favorably upon it, it becomes a law without the necessity of a referendum.¹ If the legislature fails to act favorably, the bill is referred to the people and becomes a law if approved by the required vote. In most states the legislature is not permitted to amend the bill originating under the popular initiative, but in some states it may submit a rival or substitute measure to popular vote. The governor has no power to veto any measure passed under the initiative and referendum.²

Arguments
for direct
legislation

The arguments for and against the initiative and referendum have been fully set forth in many places.³ In summary, the chief advantages urged are: (1) the system unquestionably gives the electorate an affirmative and negative check upon the legislature, the need of which has long been felt in many states, especially in those in which political "machines" or special interests have dominated the legislature; (2) it tends to stimulate popular interest in the work of the legislature, for the electorate is directly responsible if laws are unsatisfactory; ⁴ (3) it tends to reduce legislative corruption because the legislature's decision on proposed laws is no longer final, and it has been the finality of that decision that has made it worth while to resort to corrupt methods to influence legislative action; (4) inasmuch as the people are given the final word as to what shall be law, many existing constitutional limitations on the legislature may safely be relaxed or repealed alto-

¹ Voters who disapprove a law passed by the legislature under the initiative may invoke the referendum after its enactment, by compliance with the rules applicable to bills originating in the legislature.

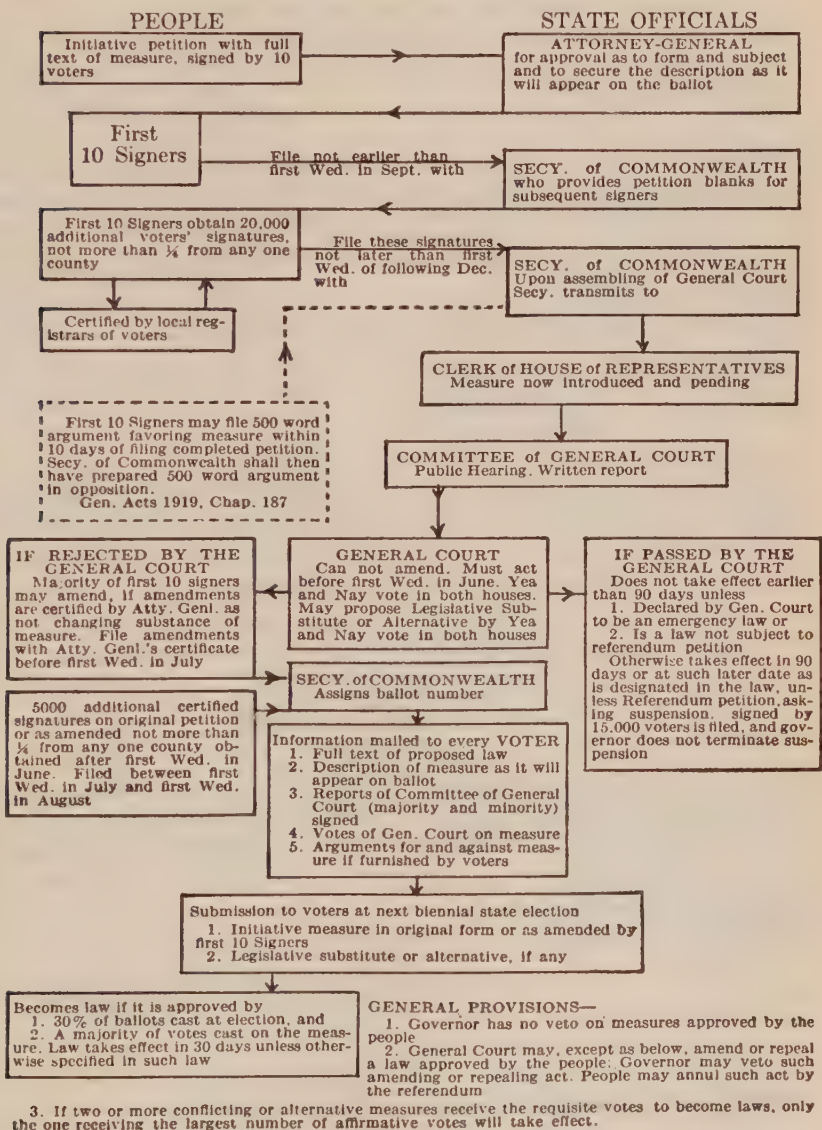
² In some states, *e.g.*, Massachusetts, additional signatures to the initiative petition are required in order to bring the measure to a popular vote after it has failed to pass the legislature.

³ The most comprehensive discussion of all phases of the initiative and referendum is to be found in the *Mass. Const. Conv. Debates*, II (Boston, 1917); *Illinois Const. Conv. Proceedings, 1920-1922*, I, 239-342. See also, G. H. Haynes, "How Massachusetts Adopted the Initiative and Referendum," *Polit. Sci. Quar.*, XXXIV, 454-475 (Sept., 1919).

⁴ In half the states having the initiative and referendum "publicity pamphlets" are provided for. These contain an exact copy of all measures referred to the voters, together with such arguments pro and con as interested persons may care to advance. Copies are mailed by some state official to all of the voters before each election.

STATUTORY INITIATIVE PETITION IN MASSACHUSETTS

An Initiative Petition may propose and secure a decision by the voters upon any LAW upon any subject not expressly excluded.

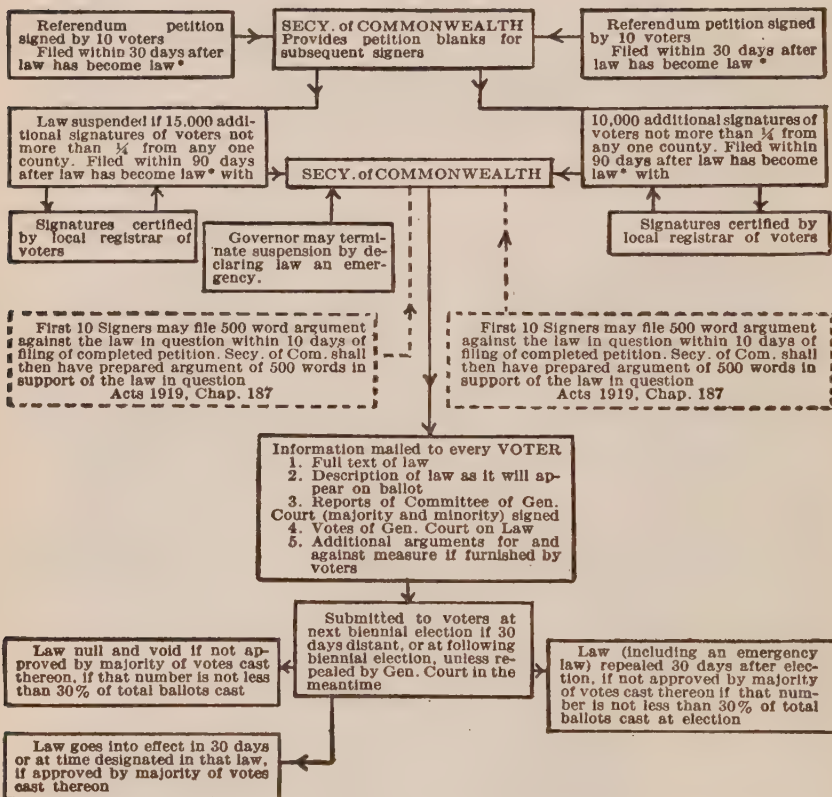


STATUTORY REFERENDUM IN MASSACHUSETTS

A Referendum Petition may ask for a referendum to the voters upon any LAW enacted by the General Court which is not expressly excluded.

Petitioners ask for Referendum with SUSPENSION of Law

Petitioners ask for Referendum WITHOUT SUSPENSION of Law. Such petition may refer to an emergency law *



***After law has become law" means after all legislative formalities thereon are completed. It may "take effect" at some later date.

Copyright, 1919, by Grace Allen Johnson.

Courtesy of Mrs. L. J. Johnson

gether; (5) constitutions in many instances may also be considerably shortened by the omission of articles dealing in detail with subjects which were purposely placed beyond reach of the legislature at a time when there was no opportunity, such as the initiative and referendum afford, to reverse or to supplement unsatisfactory legislative action.

CHAP.
XXXVI

Of the numerous objections which have been urged against the initiative and referendum the more weighty are the following: (1) the average voter is incapable of voting intelligently upon matters of legislation; (2) the system is at best "a calling for the yeas and nays, not for a full expression of opinion" and assumes that voters are ready and able to give an unqualified yes or no to any question of public policy referred to them; (3) the system, by failing to rouse interest on the part of many citizens, often results in the enactment of laws by a minority of the voters;¹ (4) the electorate is often put to the needless trouble and expense of passing upon questions which, although unimportant, may be forced upon the attention of the public through the activities of small organized groups; (5) the method of obtaining petition signatures for legislative measures is often attended by irregularities and fraud;² (6) where the initiative and referendum may be used both for constitutional amendments and for ordinary legislation the system places the fundamental civil and political rights of minorities at the mercy of temporary majorities at the ballot box; (7) the system tends to break down the quality of legislatures by weakening the sense of responsibility on the part of the individual member for what is enacted or fails of enactment, since, with the initiative and referendum, the electorate may correct any misinterpretation of its wishes on his part; (8) the system tends to aggravate the burdensome and confusing task already imposed upon the voters by requiring them not only to select a large number of public offices but also to pass upon an unlimited number of legislative proposals which may be submitted on the same ballot; (9) the scheme may be misused by a minority party in the legis-

Objections
to direct
legislation

¹C. O. Gardner, "Problems of Percentages in Direct Government," *Amer. Polit. Sci. Rev.*, X, 500-514 (Aug., 1916). "In California, during the years 1908-1915, when no publicity pamphlets were issued, the average vote upon measures submitted was 43 per cent of the total attendance at the polls; in 1916, with the publicity pamphlet in use, it was 79 per cent." W. B. Munro, *The Government of the United States*, 507, note, citing G. H. Haynes, *The Initiative and Referendum* (Boston, 1917), 37. See also, A. N. Holcombe, *State Government in the United States* (2nd ed., 1926), 498-501.

²See W. A. Schnader, "Proper Safeguards for the Initiative and Referendum Petition," *Amer. Polit. Sci. Rev.*, X, 515-531 (Aug., 1916).

CHAP.
XXXVI

A useful
device, but
not a
panacea

lature to prevent the principal laws enacted by the majority party from taking effect, as happened in Missouri ¹ in 1921-22.

Space does not permit pointing out in detail how some of these objections might apply with equal force to the submission of constitutions and constitutional amendments to popular vote; or how others also apply to laws enacted in the usual way by the legislature acting alone; or how still other grounds of objection might be removed by improving the details of initiative and referendum procedure or by withdrawing certain subjects from the operation of the initiative and referendum altogether, as has been done in Massachusetts.² It must be remembered that the system of direct legislation, as now employed in connection with state law-making, is designed primarily to weaken the influence of bosses, machines, or special interests, such as have dominated many a state legislature at one time or another and often for long periods. As a remedy for such conditions, the system is not infallible, any more than is the Australian ballot or the direct primary. Nevertheless, to many people it seems to be the best expedient available at the present time for vetoing or supplementing the acts of a legislature which proves to be, not a representative, but a misrepresentative, law-making body.³

¹ In 1921 the state Democratic organization obtained the necessary petitions for a referendum for practically all of the important measures enacted by the Republican legislature in that year. These measures came to a vote in November, 1922, and all but one were rejected. See *Nat. Mun. Rev.*, X, 438 (Aug., 1921); *ibid.*, X, 575 (Nov., 1921); N. D. Houghton, "The Initiative Referendum in Missouri," *Mo. Hist. Rev.*, XIX, 268-299 (Jan., 1925).

² Under the Massachusetts amendment the following matters cannot be reached through the *initiative*: measures which relate to religion, religious practices, or religious institutions; appointment, qualifications, tenure, removal, recall or compensation of judges; reversal of judicial decisions; powers, creation, or abolition of courts; purely local laws; specific appropriations of money from the state treasury; granting state aid to sectarian institutions; and propositions inconsistent with the right to receive compensation for private property taken for public use, the right of access to, and protection in, the courts of justice; the right of trial by jury; protection from unreasonable search, and from martial law; freedom of speech, press, peaceable assembly, and elections. Exceptions to the operation of the *referendum* include laws which relate to religion, religious practices, or religious institutions; appointment, qualifications, tenure, removal or compensation of judges; creation or abolition of courts; purely local laws; and laws which appropriate money for the current or ordinary expenses of the commonwealth or for any of its departments, commissions, or institutions.

³ An interesting comparison of legislative votes and referendum votes upon the same measures is found in B. A. Arneson, "Do Representatives Represent?" *Nat. Mun. Rev.* XVI, 751-754 (Dec., 1927). Convenient summaries of recent referendum votes will be found in *Amer. Polit. Sci. Rev.*, XI, 92-103 (Feb., 1917); *Nat. Mun. Rev.*, IX, 146-150 (Mar., 1920); *ibid.*, X, 232-239 (Apr., 1921); *ibid.*, XII, 116-118 (Mar., 1923); *ibid.*, XII, 192-204 (April, 1923); *ibid.*, XV, 42-65 (Jan., 1926); *ibid.*, XVI, 642-661 (Oct., 1927);

REFERENCES

- W. F. Dodd, *State Government* (New York, 1922), Chaps. vi, xix.
- A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), II, 331, 337, 341, 706-710.
- E. Kimball, *State and Municipal Government in the United States* (Boston, 1922), Chap. vi.
- A. N. Holcombe, *State Government in the United States* (2nd ed., New York, 1926), Chap. xv.
- J. M. Mathews, *American State Government* (New York, 1924), Chaps. iii, v, vii.
- P. S. Reinsch, *American Legislatures and Legislative Methods* (New York, 1907), Chap. x.
- E. Freund, "The Problem of Adequate Legislative Power under State Constitutions," *Acad. Polit. Sci. Proceedings*, V, 98-126 (1914).
- R. M. Story, "Amendment of Statutes," *Amer. Polit. Sci. Rev.*, X, 743-748 (Nov., 1916).
- C. L. Jones, *Statute Law-making in the United States* (Boston, 1912).
- H. Secrist, "Economic Analysis of the Constitutional Restrictions upon Public Indebtedness in the United States," *Univ. of Wis. Bull.*, No. 637 (1914).
- P. O. Ray, *Introduction to Political Parties and Practical Politics* (3d. ed. New York, 1924), Chap. xx. Contains an extended list of references on the initiative and referendum.
- A. L. Lowell, *Public Opinion and Popular Government* (New York, 1913), Chaps. x-xi, xiii-xv.
- A. B. Hall, *Popular Government* (New York, 1921), Chap. vi.
- J. D. Barnett, *Operation of the Initiative and Referendum in Oregon* (New York, 1915).
- E. P. Oberholtzer, *The Referendum in America* (new ed., New York, 1912).
- J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chap. xxxix.
- F. M. Davenport, "The Use and Abuse of Direct Democracy," *Outlook*, CX, 677-684 (July 21, 1915).
- T. H. Reed, "Popular Legislation in California, 1920," *Amer. Polit. Sci. Rev.*, XV, 386-390 (Aug., 1921).
- J. King, *The American Voter as a Lawmaker* (Washington, 1923). Pamphlet.
- G. H. Haynes, "People's Rule in Oregon, 1910," *Polit. Sci. Quar.*, XXVI, 32-62 (Mar., 1911); "Peoples Rule on Trial," *ibid.*, XXVIII, 18-33 (Mar., 1913).
- J. D. Barnett, "Judicial Review of Exceptions from the Referendum," *California Law Rev.*, X, 371-383 (July, 1922).
- C. G. Haines, "Judicial Review of Legislation in the United States and the Doctrine of Implied Limitations on Legislatures," *Texas Law Rev.*, II, 257-290, 387-421 (Apr.-June, 1924), III, 1-43 (Dec., 1924).
- Curr. Hist.*, XXI, 841-843 (Mar., 1925); National Popular Government League, *Bulletin* No. 97 (Feb., 1925); *ibid.*, *Bulletin* No. 107 (Feb., 1927); *Polit. Sci. Quar.*, Supplement XL, 80-99 (Mar. 1925). See also, R. L. Buell, "Democracy in California," *Outlook*, CXXIX, 178-179 (Oct. 5, 1921).

CHAPTER XXXVII

THE LEGISLATURE AT WORK

General
similarity
of organ-
ization

The legislature is, in general, free to organize itself in whatever manner it chooses and to carry on its work under rules of its own making. Naturally there is variation in these matters from state to state. Yet in their larger aspects organization and procedure are everywhere much the same, partly because similar duties lead to similar modes of action, partly because there has been a good deal of copying by one state from another, but mainly because of the inevitable tendency to follow the example of Congress. The presiding officer of each house, the committee system, the handling of bills and resolutions, the rules of debate—all show the profound influence of the federal example.

Officers

The presiding officer in the lower house is, as in the House of Representatives at Washington, a speaker; and, like his national prototype, he is elected by the entire house, although the representatives who belong to the majority party actually choose him in caucus. In most of the upper houses the lieutenant-governor presides, after the manner of the vice-president in the United States Senate; in the other cases a president of the senate is elected by the members of that body from among their own number. These presiding officers exercise substantially the same influence and authority over the proceedings of their respective houses that are exercised by the speaker and vice-president in Congress; and the other members of the legislature enjoy about the same privileges and immunities as members of Congress.¹ The power of the speakership has developed most in states where there is a large amount of business to be transacted, where the house is so large as to be unwieldy, where sessions are of short duration, and also where, as in New York, party lines are closely drawn. Each house of the legislature also chooses a clerk, a chaplain, a sergeant-at-arms, and other necessary officers and attendants.²

¹O. P. Field, "The Constitutional Privileges of Legislators," *Minnesota Law Rev.*, IX, 442-457 (Apr., 1925).

²Not infrequently spoils considerations lead to "padding the payroll," i.e., increasing the number of legislative employees out of proportion to actual requirements.

Every legislature is subdivided into committees for the more effective consideration of the large number of measures introduced.¹ Appointments to these committees are usually made by the presiding officers of the respective houses, although in almost a third of the states the assignments are made, rather, by a committee on committees. Whichever method is employed, the dominant party almost invariably has a majority on each committee. There is much difference of opinion upon the relative merits of the two methods. In Nebraska, at all events, it is felt that the use of a committee on committees has secured the important places for the persons best fitted for them, has done away with the suspicion of trading committee appointments in order to secure votes for the position of presiding officer, and has distributed committee assignments more equitably among the different sections of the state.

The number of senate committees varied in 1917 from five in Massachusetts and Wisconsin to sixty-two in Michigan; in about two-thirds of the upper houses the number exceeded twenty, and in five cases it exceeded forty. The number in the lower house ranged from seven in Massachusetts to sixty-three in Kentucky and sixty-five in Michigan, almost half of the states having forty or more. In Massachusetts and a few other states, the bulk of legislation is handled by a system of joint committees made up of members from both houses. This arrangement has several points

CHAP.
XXXVII
Commit-
tees:
composi-
tion and
number

The joint-
committee
system

¹ Bills are assigned to appropriate committees by the presiding officer in each house, although his action may be overruled by the house and the bill sent to another committee.

The following are the usual steps in the enactment of a bill, although slight variations are to be found in the different states:

(1) Introduction by any member or by a committee. A member either rises in his place and asks permission to introduce a bill (permission is never withheld) or merely files the bill at the clerk's desk;

(2) First reading, generally by title only, followed by order for printing copies for use of members, and reference to a committee;

(3) Consideration in committee, followed by favorable or adverse report to the house;

(4) Second reading at length, with opportunity for debate and amendment;

(5) Third reading, with some further opportunity for debate and amendment, followed by the final vote on the perfected bill;

(6) Transmission to the other house, where practically the same routine is followed;

(7) Appointment of a conference committee to adjust differences between the two houses;

(8) Adoption of the report of the conference committee in each house;

(9) Submission of the bill as enacted to the governor for his approval or veto;

(10) Return of the bill, if vetoed, to the house in which it originated; if passed by the requisite majority, it goes to the other house for similar action.

CHAP.
XXXVIICommit-
tees com-
monly too
numerous

of distinct advantage over the dual committee system. In particular, it avoids the duplication and delay which are more or less inevitable when the same measures are handled by two committees, and it reduces the tendency to shift responsibility from one house to the other.¹ In most states the number of committees is far larger than the efficient handling of legislative business requires. As a rule, it has been determined more by petty personal and political considerations than by the necessities of good procedure. The disadvantages of too many committees are obvious. In the first place, each member is required to serve on more committees than he can actually give time to; in the Illinois senate of 1923, each member belonged, on an average, to about twelve committees. Furthermore, too many committees means reference to different committees of matters of the same general nature which could more satisfactorily be handled by a single committee. A reduction in the number of committees in Illinois in 1915 from sixty-six to thirty-three in the house and from forty-one to twenty-six in the senate contributed in a large measure to the increased efficiency with which legislation was handled that year.

Desirable
reorganiza-
tion

Even these numbers are needlessly large. In most legislatures, if not in all, business could be handled more promptly and efficiently if a system of joint committees on the Massachusetts model were substituted for the dual committee system; the number of these joint committees should not exceed fifteen, and all should be organized on functional lines. To half a dozen major committees on finance, agriculture, industrial affairs and manufacturing, public utilities, municipalities, and judiciary, ten minor committees might be added, somewhat as follows: public efficiency and civil service, elections, enrolled and engrossed bills (or third reading), education, rules, rights of minority, public welfare, hygiene and sanitation, public works, banking and insurance, and miscellaneous matters.² If, however, the joint committee system cannot be adopted, there should at least be a uniform committee organization in the two houses; and this organization ought to be coördinated with the administrative organization of the state, in order to bring the legislative and executive branches into closer relationship.

Surprisingly few states have followed the example of California

¹ A. N. Holcombe, *State Government in the United States*, Chap. ix.

² This is substantially the plan recommended by C. L. Smith in *Amer. Polit. Sci. Rev.*, XII, 607-639 (Nov., 1918).

and Nebraska in having a definite schedule of committee meetings and hearings prepared at the opening of each session and assigning definite days and hours for the meetings of each committee. With a rule limiting the number of committees on which each member may serve, it is possible so to group committee meetings as to prevent members excusing their absence on the ground that they were attending some other committee meeting. Obviously, the fewer committees there are, the easier it will be to develop such a schedule.¹

Other defects of the present committee system must be passed over rapidly. Committees are often so large as to make them unwieldy, thus throwing undue power into the hands of the chairmen or of sub-committees. The largest committees are found in Pennsylvania, Illinois, and Iowa, where memberships range from twenty-five to forty-seven. Another serious defect in most states is the secrecy—at all events, lack of publicity—and the irresponsibility surrounding committee sessions. Few states require committees to publish notices of the time and place of their meetings, as they are required to do in Massachusetts and Nebraska; or to maintain public calendars of all committee meetings and hearings, as is done in Wisconsin; or to keep and publish minutes of all proceedings; or to open all sessions to the public. In the great majority of states, furthermore, the two houses have retained insufficient control over their committees, one of the results being the frequency with which committees indefinitely hold up, and thus smother, measures which have been referred to them. This situation is deliberately maintained in the interest of the legislative “machine” in some states, especially where there are “graveyard” committees consisting of tried and trusted machine leaders, to which measures are referred with the confident expectation that they will not be heard of thereafter during the session. In 1913 a committee of this sort in the Pennsylvania senate smothered 137 bills which had passed the lower house. Restrictions should be placed upon the length of time which a measure may remain in the hands of a committee without being reported; and the rules should be so amended as to make it easier to compel a committee to report a measure which it has had in its possession for a reasonable length of time.

Another common defect is unequal distribution of legislative work among committees. In the Ohio legislature of 1919, for ex-

CHAP.
XXXVII
— — —

Other
defects of
the com-
mittee
system

Overworked
and idle
committees

¹Smith, *op. cit.*, 631.

ample, four committees in the house, and four in the senate had no work whatever; four house, and six senate, committees had only one or two measures to consider; and seven committees in the house and eleven in the senate had only three or four measures. In other words, thirty-six committees had nothing, or practically nothing, to do. On the other hand, the senate judiciary committee received eighty-two measures, and the corresponding house committee received seventy-three; while sixty-one and sixty-six measures went to two other house committees, respectively.¹ Out of a total of 797 bills referred to committees in the lower house in Illinois in 1923, 454 were handled by four committees, while some of the other committees had almost nothing to do. One also often finds the same duplication of older and more influential members on a half-dozen of the most important committees which has appeared in the case of congressional committees, and which is a further explanation of the success with which the legislative "machine" does its work. In the Illinois senate of 1923, each of seven members was on twenty or more committees, one member serving on thirty. There are also features connected with the operation of the committee on rules, the "steering" committee, and the conference committees² which enable these agencies to become autocratic and irresponsible masters of legislative proceedings, especially in the last crowded days of the session.

The "interlocking" system

Importance of reorganizing committees which handle financial legislation

Finally, the committee system in many legislatures should be so reorganized as to bring about closer and more harmonious relations among all committees which in any way, directly or indirectly, have to do with financial legislation. Our legislatures have long had a reputation for wastefulness and extravagance. In part, this arises from the fact that until recently their methods of handling financial measures were full of confusion and in urgent need of systematization. Almost all legislatures have had several committees at the same time dealing with financial matters, each

¹ C. A. Dykstra, in *Civic Affairs*, Aug., 1919. On the organization and work of the Ohio legislature of 1927, see report of the legislative committee of the Citizens' League of Cleveland, in *Greater Cleveland*, II, 175-182 (June 15, 1927).

² Conference committees are appointed by the respective presiding officers of the two houses when a bill originating in one house has been changed during its passage through the other. It is customary to appoint on such committees, in addition to other persons, the chairmen of the house and senate committees which have had the bill in charge. These conference committees endeavor to reach a compromise on the points of difference between the two houses. If they are successful, the measure as reported by them almost invariably passes both houses without further debate.

house having its separate set of such committees. Frequently each of these committees and sets of committees has worked more or less independently of, and even in rivalry with, the others. There have been in each house a committee on raising revenue, commonly called the committee on ways and means, and further committees in charge of appropriation bills. Still different committees have often handled measures which are not technically appropriation bills although seriously affecting the state finances—for example, bills establishing a state police organization, a state public utility commission, or authorizing a re-codification of the state laws. Numerous such measures carrying incidental charges upon the state treasury have been passed without any serious attempt to ascertain the total amount of demands upon the treasury until after the legislature has adjourned. As a result, deficits have been very common. Committees on "contingent expenses" are also often found in one or both houses and are a favorite instrument of corrupt politics.

Within the past few years, however, especially in connection with the movement for budget reform, a number of states have introduced important improvements in their methods of handling financial legislation. In a few cases all appropriation bills are assigned to one committee in each house, and to this committee must be referred, before final passage, all measures which directly or indirectly involve an expenditure of state funds, so that a complete and detailed list of charges on the treasury may be tabulated some time before the legislature adjourns. Such reforms might well be carried farther to include a consolidation in each house of the money-raising and money-spending committees in a single committee, in order to ensure a better balancing of income and outgo than is now possible in most states; and a still greater degree of responsibility would result if a single joint finance committee were to be substituted for the separate committees in each house.¹

Most of the older states more or less deliberately copied the congressional procedure in force at the time of their admission into the Union, and the newer states have usually adopted *en bloc* the body of rules in operation in some near-by state, rarely ventur-

Legislative
rules diffi-
cult to
change

¹ Excellent discussions of the committee system will be found in C. L. Smith, "The Committee System in State Legislatures," *Amer. Polit. Sci. Rev.*, XII, 607-639 (Nov., 1918); P. S. Reinsch, *American Legislatures and Legislative Methods*, Chap. v; F. E. Horack, "The Committee System in Iowa," in *Statute Law-Making in Iowa* (Iowa City, 1916), 533-609; and H. W. Dodds, "Procedure in State Legislatures," supplement to *Annals Amer. Acad. of Polit. and Soc. Sci.*, LXXVII (May, 1918).

ing upon any experiments of their own. Once adopted, the rules are seldom changed. Legislators who would not hesitate a moment to propose drastic changes in statute laws or in the organization of the administrative branches of the government commonly display little or no originality, courage, intelligence, or perseverance in introducing and insisting upon changes in the rules governing the proceedings of their own body. These rules should be such as to expedite business, to ensure adequate consideration of measures both in committees and on the floor of the two houses, to give a fair opportunity for all parties to be heard in debate, and to secure publicity and responsibility at every stage of the law-making process. In few states, however, have rules been adopted with these ends primarily in mind.¹ Both in Congress and in a great majority of state legislatures, rules have been so constructed in times past as to perpetuate the power and influence of a small group of the more experienced members, commonly referred to as the legislative "machine," whose controlling influence might be undermined by simplifying and clarifying the processes of legislation.²

Effects of
the inexperience
of new
members

When a legislature assembles for the first time most of the members are inexperienced and wholly unfamiliar with the legislative rules. The older members, or a well-organized inner group of them, who know the value of these old rules for their purposes, quickly move the adoption of the rules of the preceding session, commonly without any change whatsoever. This motion usually goes through without opposition from the newer members, who, indeed, seldom know what to oppose. Thus the house finds itself bound by rules which include one relating to the process by which these same rules may be amended. This process has purposely been made very difficult by former legislative leaders in order to prevent "insurgent" or independent groups from overthrowing or undermining the influence of the "machine." Therefore, if any thoroughgoing reform in the rules is to be effected, the new members must make a careful study of them and their practical operation before the legislature convenes, and must get together and organize before that date, just as the "old guard" does, so as to

¹ A comprehensive study of legislative rules is to be found in H. W. Dodds, "Procedure in State Legislatures," published as a supplement to *Annals of Amer. Acad. of Polit. and Soc. Sci.*, LXXVII (May, 1918).

² For an illuminating exposition of the way in which legislative rules may be utilized to perpetuate control of legislative machinery, see Congressman M. Clyde Kelley, *Machine-Made Legislation* (Braddock, Pa., 1912), based upon the author's observation as a member of the Pennsylvania legislature of 1911.

coöperate effectively in bringing about changes at the strategic moment. Some of these changes, *e.g.*, "gateway amendments" making it easier to amend the rules, must obviously be adopted, if at all, at the opening session before the old guard fivets down the former rules unchanged.

CHAP.
XXXVII

Rules which are really effective in expediting business have been put into operation in fewer than a third of the states. The lack of them often entails very serious consequences, especially in states where the duration of the legislative session is limited by the constitution. Almost everywhere a great deal of time is wasted in the early part of the session, or at best is consumed in organizing, in making committee assignments, and in gaining familiarity with the complicated rules. Moreover, the legislature is rarely in session more than four days a week. During this time the main work is being done by the various committees; and comparatively few states have rules compelling committees to report on bills assigned to them within a specified time. Furthermore, experienced members sometimes deliberately seek to delay action on bills in which they have a peculiar interest, in the hope that the measures will be able to slip through without attracting attention. The result is a most unseemly crowding of business into the last two weeks or ten days of the session, during which the houses work overtime, and often amid the most demoralizing confusion.¹

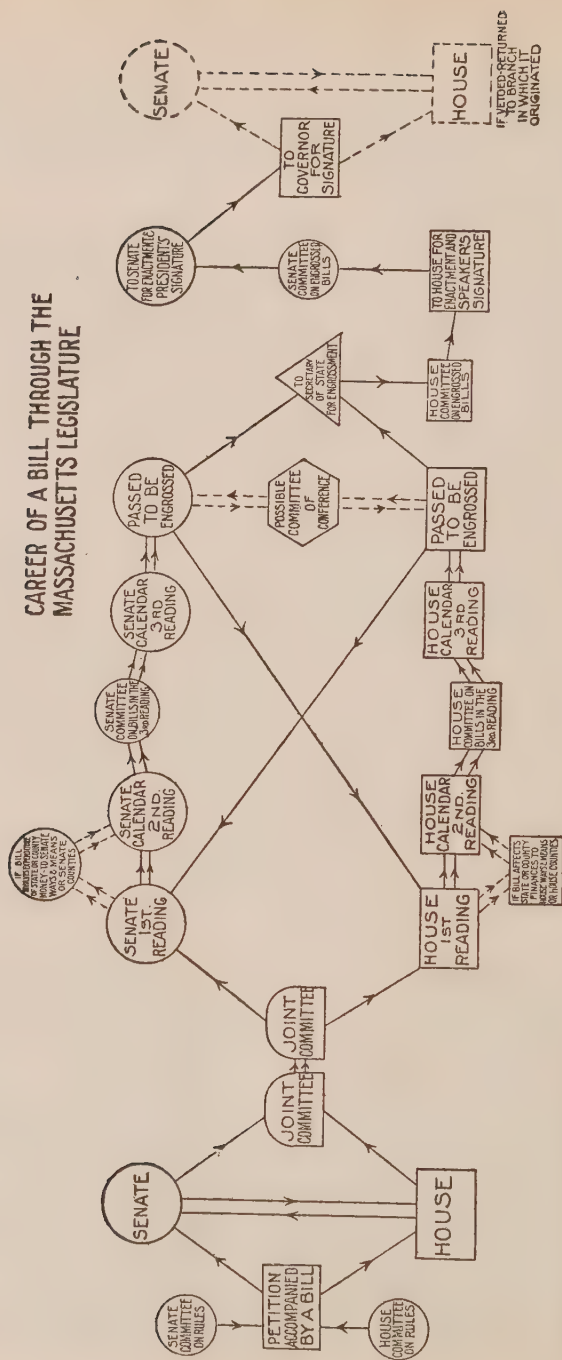
Congestion
of business
during the
closing
day of a
session

One legislature which was in session four months and in that time passed over eight hundred laws and resolutions enacted half of this number in the last fifteen days, at an average rate of almost thirty a day, an even hundred being passed on the last day.

That such congestion is quite needless is proved by the experience of Massachusetts. Although the number of bills introduced in the legislature of that state exceeds the number appearing in many other states, no final rush of the kind just described ever takes place. The rules are devised largely for the purpose of obtaining a prompt consideration of measures, and a joint committee system has contributed greatly to the achievement of that result. Substantially all measures are introduced early in the session, which opens in January. Committees are required to report on all measures referred to them not later than the second Wednesday of March; and although this period may be extended by one month, at its expiration all measures in the hands of committees

Congestion
avoided
in Massa-
chusetts

¹ See p. 703.



Courtesy of Lt. Governor Frank G. Allen

must be reported within three days, except appropriation bills.¹ After reporting and second reading, bills go to the committee on third reading,² and if there is delay here, a report may be forced. Ordinarily this committee reports within two or three days, and the bill is then voted on.

CHAP.
XXXVII

In other states a variety of less effective devices have been tried. Some prohibit the introduction of new bills after a certain date, or within so many days of final adjournment; after the specified date, new bills may be introduced only by unanimous consent, or at least a two-thirds or three-fourths vote. California (1911) and West Virginia (1920) have adopted the split session: the first part may last thirty days in California and fifteen days in West Virginia, and is almost wholly devoted to the introduction and reference of measures. A recess is then taken, for the purpose of enabling both the members and the public generally to study the bills introduced. When the legislature reconvenes, new bills may be introduced in California only with the consent of three-fourths of the members and in West Virginia only with the consent of four-fifths; and in the former no member may introduce more than two such bills. In these two states and in Massachusetts the split session has been definitely authorized by constitutional amendment; in Alabama, on the other hand, it exists wholly at the discretion of the legislature and without any specific authorization by the constitution.³

¹ Similar time limits are in force in only about one-third of the states, See *Ill. Const. Conv. Bull.*, No. 8 (1920), "The Legislative Department," 560 ff. For further details relating to procedure in the Massachusetts legislature, see L. A. Frothingham, *A Brief History of the Constitution and Government of Massachusetts* (2nd. ed., Cambridge, 1925), Chap. vii; A. C. Hanford, "Massachusetts, Different from the Others," *Nat. Mun. Rev.*, XIII, 40-48 (Jan., 1924).

² It should be added that this committee on third reading exercises a careful scrutiny of each bill before final passage to see what defects there may be in it, and how it fits in with existing legislation. This part of the committee's work is attended to by a trained secretary, and the result is that the laws of Massachusetts are on the whole probably not excelled in technical form by those of any other state.

³ A. N. Holcombe, *State Government in the United States* (2nd ed., 1926), 274 n. 3. See V. J. West, "Our Legislative Mills: California, the Home of the Split Session," *Nat. Mun. Rev.*, XII, 369-376 (July, 1923); also R. Luce, *Legislative Assemblies*, Chap. viii; M. L. Faust, "Results of the Split Session System of the West Virginia Legislature," *Amer. Polit. Sci. Rev.*, XXII, 109-121 (Feb., 1928). Massachusetts, in 1918, adopted a constitutional amendment empowering the legislature, within the first sixty days of a session, to take a recess of not more than thirty days. As yet (1928), however, the legislature has not adopted the split session. In 1920 the people of Oregon rejected a constitutional amendment providing for a split session. *Amer. Polit. Sci. Rev.*, XV, 264-265 (May, 1921).

CHAP.
XXXVIIMost legis-
lators are
not experts

None of our state legislatures can by any stretch of the phrase be called a body of experts on either the form or the substance of legislation. Members come from all walks of life and ordinarily give only a few months once in two years to the business of law-making. Apart from the lawyers, who generally form the largest single group, few have had training or experience which in any degree specially qualifies them to frame laws; and in view of the numerous pitfalls which lie in the legislator's pathway, it may be doubted whether many of the lawyers who appear in legislative bodies are able to draw up important public measures in proper technical form. Furthermore, a comparatively small proportion of the members of either house have had previous legislative experience. Rarely does it happen, as it did in Illinois in 1917 and 1919 and in California in 1927, that a majority in each house has served in former legislatures; far more commonly, only a third or a fourth of the members have had any experience in legislative work.¹

Bills are
commonly
drafted
outside of
the legis-
lature

This lack of special qualifications for the technical side of law-making is not so serious as might be supposed, for, contrary to the popular impression, comparatively few measures are drafted by the legislators themselves. The great majority of bills are prepared by lawyers outside the legislature who have been employed for that purpose by private individuals, associations, committees, or corporations, or by county, municipal, or other local government bodies; or they are prepared by some of the principal state executive officers. Bills drawn by one or another of these agencies may be formally introduced in the legislature by any member. A member who renders this service may assume responsibility for the measure which he presents, or he may expressly disclaim all responsibility for it by saying that he merely introduces it "by request." Unfortunately, no limit is placed upon the number of measures which individual members may introduce, and no satisfactory way has yet been devised of checking the avalanche of

¹ Out of 153 members of the lower house of the Illinois legislature of 1917, 90 had served in the preceding legislature, as had 14 out of the 25 newly-elected senators. Two years later, the house had 97 members, and the senate 19 out of 26 newly-elected members, who had served in the previous legislature. In the California legislature of 1927 only six out of forty senators and 22 out of 80 members of the lower house had not had previous legislative experience. On the other hand, in the Minnesota lower house in 1911 only 45 out of 120 had served before; in Missouri in 1911, only 41 out of 143; in North Dakota in 1909, only 24 out of 95; and in Vermont in 1911, only 22 out of 246. See *Ill. Const. Conv. Bull.*, No. 8 (1920), "The Legislative Department;" C. L. Jones, *Statute Law-Making*, 12-13; R. Luce, *Legislative Assemblies*, Chap. xvi; A. C. Hanford, "Massachusetts, Different from the Others," *Nat. Mun. Rev.*, XIII, 46 (Jan., 1924).

good, bad, and indifferent legislative proposals which descends biennially in practically every state.

CHAP.
XXXVII

To meet the ordinary legislator's need for assistance on the technical side of law-making, a considerable number of legislatures have created a bill-drafting bureau, often in connection with a legislative reference library, although in other instances the two are entirely distinct; and every member is privileged to avail himself as much as he likes of the assistance which this bureau, through its experts in bill-drafting, can render in putting his ideas into proper form for enactment into law.¹ Our state laws, in general, would be greatly improved in form, and fewer of them would be declared unconstitutional by the courts on purely technical grounds, if every measure had to pass the scrutiny of a well-trained staff of draftsmen before its introduction, or at least before its final enactment. For the successful operation of such a bill-drafting agency, it is essential that adequate salaries be paid the members of the staff in order to insure the services of highly capable lawyers; that they be appointed only after examinations thoroughly testing their ability; and that their positions be permanent and entirely free from any taint of the spoils system or partisanship.

Bill-
drafting
bureaus

Far the greater portion of the legislator's time is occupied in studying and making up his mind upon the merits of bills which have been prepared in one or another of the ways mentioned. Many of these measures affect large classes in the community and deal with highly complicated problems connected with manufacturing, mining, transportation, banking, insurance, taxation, the regulation of professions, the reorganization of local and state government, and numerous other subjects upon which even the best qualified legislator may well feel incompetent to act wisely without a great deal of reflection and enlightenment. To legislate intelligently upon such matters demands not merely good intentions, honesty, and fair-mindedness, but great industry and painstaking study of the conditions or problems which are to be affected by the proposed legislation. Happily, if the legislator's previous experience or study has not placed him in possession of first-hand knowledge of these matters, he may, if he is industrious and conscientious, acquire the requisite information in one or more of several different ways.

Wise
legislation
involves
careful
study of
proposed
laws

¹ E. Cleland, "Bill Drafting," *Amer. Polit. Sci. Rev.* VIII, 244-251 (May, 1914); P. Mason, "Legislative Bill Drafting," *California Law Rev.*, XIV, 298-310, 379-392 (May-July 1926).

CHAP.
XXXVIISources of
informa-
tion:1. Legisla-
tive refer-
ence
libraries

First, he may go to the legislative reference library; in almost every state some such institution has been established within the past ten or twenty years. There he will find that a trained staff has collected and carefully indexed for ready reference a great amount of useful material pertaining to subjects which may come before the legislature, such as taxation, education, labor, pensions, regulation of public utilities. He will find similarly available the statutes of the different states, judicial decisions interpreting and applying these statutes in concrete cases, documents showing the weaknesses or defects which have developed in the actual administration of the laws, reports of state administrative officials, and governors' messages. He may receive valuable assistance from the library staff in drafting a measure which he has in mind, and also useful information regarding the way in which it may be safely steered through the intricate channel of legislative procedure. The extent to which legislators avail themselves of this source of help naturally varies greatly from state to state, and from legislature to legislature in the same state, and some members probably make no use of it whatever. Nevertheless there is great gain in having such an institution at hand for the use of those who care to take advantage of it.¹

2. Reports
of special
commis-
sions

Special commissions are not infrequently authorized by the legislature to investigate difficult and complicated problems and report their recommendations at a later session. Reports of such commissions dealing with taxation, the reorganization of the administrative branches of the state government, revision of the election laws, workingmen's compensation and other labor laws, insurance laws, civil service retirement and pension funds—to mention only a few—have been important aids to intelligent legislative action in more than one state in recent years.

3. Commit-
tee hearings

Public hearings before committees constitute another channel through which legislators may acquire useful information concerning pending measures. At such hearings arguments for and against a bill are presented to the committee having the measure

¹ J. B. Kaiser, *Law, Legislative Reference, and Municipal Reference Libraries* (Boston, 1914); J. H. Leek, *Legislative Reference Work—A Comparative Study* (Philadelphia, 1925); *ibid.*, "The Legislative Reference Bureau in Recent Years," *Amer. Polit. Sci. Rev.*, XX, 823-831 (Nov., 1926); J. A. Lapp, "Making Legislators Law-Makers," *Annals Amer. Acad. Polit. and Soc. Sci.*, LXII, 172-183 (May, 1916). For a detailed account of the organization and methods of the Wisconsin legislative reference library, see Charles McCarthy's article reprinted in P. S. Reinsch, *Readings on American State Government*, 63-74.

in charge by private individuals, either in person or by attorney, and by private and public corporations through their officers or other representatives. Unfortunately, however, the legislators who are not on the committee are so occupied with other duties that they seldom find time to attend such hearings, and therefore often do not directly receive much enlightenment therefrom.

CHAP.
XXXVII

Upon broad matters of public policy, such as prohibition, woman suffrage, income taxes, and state aid for highway construction, the ordinary legislator may well represent, without much special study or investigation, the sentiments and desires of the community which elected him. But such broad subjects come before the legislature rather infrequently as compared with more detailed and technical questions. The same is true of laws relating to the rights and liabilities of citizens in their everyday social and business relationships, which, in most states, are in a fairly static condition; only a comparatively small part of the work of the legislature relates to the development of rules for the regulation of these relationships. For example, it has recently been roughly calculated that of the 338 laws passed by the legislature of 1917 in Illinois, only seventeen can be classed as primarily regulating the private rights of individuals, and that of 429 passed in 1919 only fourteen can be so classed. Of the remaining 415, in 1919, sixty-seven related to state appropriations, 177 to state administrative matters, and 171 to local administrative matters.¹ If the foregoing data may be assumed to be fairly typical of the work of legislatures generally, the great bulk of state legislation pertains to such subjects as taxation, to appropriations for the support of the many state offices and the varied institutions and activities maintained by the state, and to the work of county, city, and other local governments.

The content
of legisla-
tion

Most of the information which legislators need in order to act intelligently on such matters must come directly or in various roundabout ways from the officers, boards, or commissions having most to do with those things and therefore presumably better informed upon them than the average legislator is apt to be. To the governor, therefore, to the heads of the various executive departments, to the superintendents of state institutions, to the directors of various state activities, to state administrative boards, to local government officials, and particularly to state officers who have a general supervision over various functions of local govern-

Desirability
of closer
official rela-
tions be-
tween the
legislative
and execu-
tive
branches

¹ See *Ill. Const. Conv. Bull.*, No. 8 (1920), "The Legislative Department," 588-589.

How this
relation
might be
brought
about

ment units (for example, the state tax commission, the state board of education, and the public utilities commission)—to all of these our legislators are obliged to look in order to obtain the information which is essential to intelligent action.

Inasmuch as perhaps nine-tenths of the work of the legislature today has to do with the administration of state and local government, the dependence of the legislature upon the administrative organs of the government for information, and the dependence of the administrative authorities upon the legislature for power and for funds, point forcefully to not only the desirability, but the necessity, of close coöperation between the legislative and administrative departments if either is to do its work effectively. Unfortunately, whatever connection and coöperation exist today between them has to be achieved in roundabout ways. This condition is likely to continue until legislatures adopt rules permitting the governor and other executive officers of the state to prepare and introduce measures relating to their respective offices or departments and giving such measures a specially favored place on the legislative calendars; and until legislatures adopt rules permitting and requiring the governor and other state executive officers to appear on the floor of either house to explain and defend their requests for appropriations or for other legislation. Unfortunately, there is slight reason to expect that many legislatures will, in the near future, introduce these desirable changes. Jealousy of executive influence and prestige is more than likely to prompt instant declaration, when the change is suggested, that "the fathers" in their wisdom decreed that the two departments of government should be and should remain separate and independent, and that to adopt the proposed arrangement would mean to violate the spirit, if not the letter, of the constitution. The people in most states will therefore probably have to wait until a constitutional convention gives formal recognition in the fundamental law to the importance of more direct official relations between the administrative and legislative organs of government.¹ Meanwhile, the effectiveness of state legislatures will continue to be seriously impaired by adherence to theories of the separation of governmental powers which, in the domain of state government, as in that of

¹Under a constitutional amendment adopted in New York in 1927, "the legislature in considering the budget has the right to bring the governor and the department heads on the floor of either house and quiz them with respect to any of the budgetary information or proposals." *Nat. Mun. Rev.*, XVI, 743 (Dec., 1927).

municipal government, have been proved by long experience to be injurious if rigidly applied.¹

CHAP.
XXXVII

Legislative
leadership

In bodies as large and unwieldy as are most of our state legislatures, leadership is indispensable and is bound to appear in one form or another. If the members are to work intelligently and effectively, some one must select from the huge mass of bills those that are to be advanced to a final vote. Inasmuch as legislative bodies nearly everywhere are elected and organized along party lines,² a varying degree of leadership is likely to appear in the party legislative caucus, which is usually dominated by a small group of older and seasoned members who have become thoroughly familiar with the rules and are skillful in influencing their fellow-members.³ In this group the speaker of the house and the president *pro tempore* of the senate are almost certain to be included, owing to the strategic positions which they hold in the legislative organization. Sometimes leadership is assumed mainly by the committee on rules, or by the steering committee, especially in the last crowded days of a session; and less frequently, by the chairman of the appropriations committee and the chairmen of a few other committees. But in not a few instances, real leadership has been found to reside entirely outside the legally appointed law-making body, and to be exercised by certain unofficial and irresponsible party chiefs. When this happens, the legislature is commonly said to be "boss-ridden" or "machine-controlled."⁴

Contrasting sharply with this sort of leadership is the rôle

¹E. M. Sait, "Participation of the Executive in Legislation," *Acad. of Polit. Sci. Proceedings*, V, 127-140 (1914); H. L. Stimson, "Responsible State Government," *Independent*, LXXIX, 14-15 (July 6, 1914); W. D. Hines, "Our Irresponsible State Governments," *Atlantic Monthly*, CXV, 634-647 (May, 1915); C. L. Jones, "The Improvement of Legislative Methods and Procedure," *Amer. Polit. Sci. Rev.*, Supplement, VIII, 191-215 (Feb., 1914). See the plan of legislative reorganization advocated by Governor Hodges of Kansas in 1913, entitled "Distrust of State Legislatures: the Causes; the Remedy," reprinted in J. T. Young, *The New American Government and its Work*, 643-651; also the legislative organization outlined in the "Model State Constitution" of the Nat. Mun. League, §§ 13-30, pp. 20-25.

²An exception is to be noted in the case of Minnesota, where the members are elected on a non-partisan ticket. On the absence of leadership in the Minnesota legislature, see R. E. Cushman, "Non-Partisan Nominations and Elections," *Annals of Amer. Acad. of Polit. and Soc. Sci.*, CVI, 83-96 (Mar., 1923).

³Usually the state legislative caucus is a far less important factor in legislation than its congressional counterpart.

⁴An admirable picture in fiction of a boss-controlled legislature (in New Hampshire) is to be found in Winston Churchill's *Coniston*. Essentially the same picture might have been drawn for the Pennsylvania legislature in the time of Quay and during the early years of the Penrose domination.

frequently assumed by the governor. In various ways the state's chief executive has become a legislative leader of the first importance, especially in putting through measures to which he or his party became definitely committed at the time of his election.¹ In connection with financial legislation, also, his influence has been considerably enhanced by the recent movement for budgetary reform.² But, unfortunately, little has been done to establish his primacy as a leader in the field of general legislation. On the whole, our legislatures are, like Congress, sadly deficient on the side of public, official, and responsible leadership. As a result, systematic and comprehensive programs of legislative work are seldom mapped out in advance; and most measures are considered piecemeal, rarely in any logical or chronological order.³ The importance of real executive leadership will be appreciated when it is recalled that upwards of nine-tenths of the work of the ordinary legislature has to do with the administration of state and local government; ⁴ and no other single official in the state can so readily obtain the information that is indispensable for the wise guidance of the law-making body in dealing with such matters. The need for executive leadership is also quite obvious when one takes account of the avalanche of legislative proposals that biennially descends upon most of our state legislatures. Between fifty and sixty thousand bills and resolutions, it has been estimated, appeared in the forty-odd legislatures meeting in 1923.⁵ Although the number is

¹ The governor also sometimes exerts much influence upon the selection of presiding officers in the legislatures, and upon the assignment of members to the more important committees.

² See Chap. XL.

³ To supply the needed leadership, the Model State Constitution of the National Municipal League (1921) provides that the reorganized single-chamber legislature shall elect seven of its members who, with the governor, shall form a legislative council with power (1) to collect information concerning the government and general welfare of the state, and report thereon to the legislature; (2) to give consideration to any proposed legislation referred to it, and report its recommendations thereon to the legislature; (3) to prepare bills on any subject for the consideration of the legislature; and (4) to perform such other duties as may be assigned to it by the legislature. Members of this council are to receive compensation in addition to their salaries as members of the legislature (§§ 29-32, and pp. 22-25). For a criticism of this plan, see H. White, "Relations Between the Governor and the Legislature in the Model Constitution," *Nat. Mun. Rev.*, XV, 441-444 (Aug., 1926).

⁴ See p. 725.

⁵ Of this number about 16,500 acts or resolutions were adopted. A. N. Holcombe, *State Government in the United States* (2nd ed., 1926), 256-257. In Nebraska, in 1913, over 1,300 bills were introduced in the lower house alone. In Illinois in the same year 1,617 measures were introduced in the two houses, and this record was broken in 1917, when 608 bills were introduced in the senate and 1,039 in the house, making a total of 1,647. In Ohio 987 bills

not always so large, it probably seldom falls below the twenty thousand mark.

CHAP.
XXXVII

The main explanation of this legislative fecundity is to be found in the fact that no legal limits have been placed upon the number of bills that may be introduced. A further explanation is found in the characteristically American tendency to seek a legislative remedy for every real or fancied ill that afflicts the body politic. And so we have, as in the case of Congress, bills relating to the most bewildering variety of subjects, many of them duplicates, many others dealing with the same subject in different ways. Some bills embody attempts to secure laws relating to matters which are clearly beyond the scope of the state's legislative power, and are therefore seldom heard of after they make their initial appearance. Others are important but of doubtful constitutionality. Countless others may be of unquestioned constitutionality but relate to unimportant topics; while not a few deserve the title they usually receive, namely, "freak measures." The vast majority of measures comprised in this amazing *mélange* never receive consideration on the floor of the houses, but die in committee, unwept and unsung.¹ Notwithstanding this high mortality rate, the number of bills of all sorts that finally pass both houses and become laws is enormous; and in the volume of "session laws" that appears shortly after the legislature adjourns one is certain to find a curious intermixture of crudely drawn measures of only ephemeral importance, and often of little more than local significance, and carefully drawn enactments of permanent value and of outstanding importance to the state as a whole.

Multi-
plicity of
bills

With forty-eight legislatures operating as so many separate laboratories or experiment stations, it is not surprising to find the same subjects, even those of the first importance, frequently dealt with in forty-eight different ways. In many instances this

The prob-
lem of uni-
form state
laws

were introduced in 1911, 1,139 in 1915, and 947 in 1919. In twelve state legislatures in 1915 more than 22,000 bills were introduced, while in 1913 the total number of measures introduced in the legislatures of forty states was in excess of 55,800. For tables showing the number of bills introduced in the regular legislative sessions of 1911-1916 inclusive, see *Equity*, Jan., 1919. Further details as to the number of legislative proposals appearing in Congress and state legislatures may be found in T. I. Parkinson, "Legislative Contribution to Progress," *Amer. Bar Assoc. Jour.*, XII, 95-99 (Feb., 1926); W. P. Helm, Jr., "The Plague of Laws," *Amer. Mercury*, X, 10-16 (Jan., 1927). Cf., H. H. B. Meyer, A New Index of State Session Laws," *Amer. Polit. Sci. Rev.*, XXII, 121-127 (Feb., 1928).

¹A highly entertaining study of legislative "resolutions" and "freak" bills is to be found in W. Seagle, "Be It Resolved," *Amer. Mercury*, X, 208-215 (Feb., 1927); "The Laws We Escape," *ibid*, X, 354-363 (Mar., 1927).

diversity is not a bad thing, and in some instances it seems unavoidable. Whenever, for example, new problems suddenly arise and demand immediate legislative solution, each legislature is obliged to blaze its own way. Experience finally may show that one state has been peculiarly successful in dealing, for example, with workmen's compensation, or the sale of fire-arms, or get-rich-quick concerns, whereupon its laws on those subjects are extensively copied by sister states. But while in many instances the absence of uniform laws is a fact not to be deplored, there are numerous matters upon which a high measure of uniformity is not only desirable but of prime importance. For there is a broad legislative field of common interest to the people of all the states over which the federal government has no control, despite the remarkable expansion of its power over interstate commerce and other matters, noted in earlier chapters.¹ The regulation of social and commercial relationships, for example, falls almost wholly to the separate states, and the absence of substantial uniformity would quickly lead—indeed, has already led in repeated instances—to confusion, and perhaps chaos. Laws governing the making and enforcement of ordinary business and insurance contracts obviously call for uniformity throughout the nation. Similar laws are also needed to prevent the legal tangles that arise in determining the status of individuals and the rights of property as affected by divorces and subsequent remarriages. When the same act is treated as a felony in one state, as a misdemeanor in another, and is not punishable at all in still other states, an argument may be advanced for uniformity in the definition of crimes.

Commissioners on
uniform
state laws

The most effective agency at work to promote uniform enactments on all subjects where uniformity is deemed desirable and practicable is the National Conference of Commissioners on Uniform State Laws. This body is composed of commissioners (usually three) from each of the states, the District of Columbia, and each of the territories and major dependencies. In thirty-three of these jurisdictions the commissioners are appointed by the governor acting under express legislative permission; in the other jurisdictions the appointments are made by the governor without definite legal authorization. The commissioners are lawyers of standing and experience, together with members of law-school faculties; and all serve without pay. Since the Conference began its work about 1890,

¹ See especially Chaps. xxviii-xxix.

it has drafted and recommended to the states for adoption fifty-three "uniform acts." Some of these have now become obsolete, so that at present the commissioners are recommending a total of forty-five acts for separate state adoption. Progress toward uniformity through separate state action is necessarily slow; nevertheless much has already been achieved in this manner. Fifty-two jurisdictions (all but one) have adopted the Negotiable Instruments Act; forty-eight jurisdictions, the Warehouse Receipts Act; twenty-eight, the Sales Act; twenty-seven, the Bills of Lading Act, and twenty-one, the Desertion and Non-Support Act.¹ But the adoption of perfectly uniform statutes by every state in the Union cannot ensure entire uniformity in the decisions of the state and territorial courts that have to interpret and apply these laws in specific cases. So that, under the existing division of legislative authority between the nation and the states, the most that can reasonably be hoped for is a greater approach to substantial, rather than complete, uniformity in dealing with such matters. Toward this goal we have been making slow, albeit noteworthy, progress during the past two or three decades.

In an earlier chapter attention was called to the regrettable absence of deep and sustained popular interest in the work of Congress.² The same popular indifference is perhaps even more noticeable in the case of our state legislatures; and essentially the same reasons may be offered in explanation. Special interests with selfish ends to serve, and well-meaning and public-spirited hobby-riders, on the other hand, maintain no end of interest in legislative work. Often they descend upon the state capital, like a cloud of locusts, and exert an influence upon the legislative output quite as important and far-reaching as that of the congressional lobby. At all events, the lobby is probably everywhere the most powerful of all influences shaping state legislation. "The lobby" is a collective

The lobby

¹ The complete list of "Uniform Acts" and of the states that have adopted them appears in the *Handbook of the National Conference of Commissioners on Uniform State Laws* (1926), 26-36, and *Amer. Bar Assoc. Jour.*, XIII, 656-658 (Nov., 1927). See also J. F. Aillshee, "Limits of Uniformity in State Laws," *Amer. Bar Assoc. Jour.*, XIII, 633-636 (Nov., 1927); C. T. Terry, *Uniform State Laws in the United States* (New York, 1920), and Supplement (1923); A. C. McLaughlin and A. B. Hart, *Cyclo. Amer. Gov't.*, III, 589-592; W. M. Crook, "Uniform State Laws," *Texas Law Rev.*, IV, 316-333 (Apr., 1926); *Congressional Digest*, VI, 183-207 (June-July, 1927), series of articles on "The Question of a Uniform Marriage and Divorce Law"; H. M. Hargest, "Keeping Uniform State Laws Uniform," *Univ. of Pa. Law Rev.*, LXXVI, 178-184 (Dec., 1927).

² Chap. XXIII.

term applied to the people who undertake to persuade the members of the legislature to oppose or to support measures which are coming up for consideration; a man or woman who makes a practice of this sort of thing is called a "lobbyist," and the practice itself is known as "lobbying." The term need not imply the corrupt use of money, or indeed any improper motive or conduct. On the contrary, it often happens that where the lobby is most industrious, numerous, and successful, corruption is wholly absent; lobbying is often of great educative value to legislators who are personally unacquainted with the merits or defects of pending bills. There are, in fact, two well-defined classes of lobbyists. The first consists of perfectly honorable men and women who adopt open-and-above-board methods of influencing members of the legislature.¹ The other is composed of the "harpies and vultures of politics," consisting usually of paid attorneys of corporations, and including many former members of the legislature who understand the inner workings of the legislative machinery. It is this second class, very largely representing special interests and employing means more or less corrupt, that gives the lobby a bad name; it is perhaps the chief cause of undesirable legislation and of the defeat of measures framed to promote the public well-being.

From the vantage point of one who has long been a student of government and has had much practical experience as a member of a state legislature, it is asserted that "the system of lobbying in legislative halls in America ought to be sharply scrutinized and modified. The lobbyist ought to be put under strict rules, and in the event of a clearly substantiated and deliberate misrepresentation made to a member of the legislature or any committee, or in the event of the use of deception and disingenuous methods, should be subject to the penalty of disbarment which a lawyer suffers when he misrepresents facts to a court. The modern lobbyist holds a more intimate relation to the course of legislation and to the ultimate effect of it than either the lawyer or the judge. The lobbyist is in a position to tamper effectively with law at its source. . . ."² Although some attempts have been made to regulate the lobbyist's activities by legislation in New York, Massachusetts, Wisconsin, and a few other states, little has been accom-

¹ W. A. Boyce, Jr., "Women as Lobbyists," *Nat. Mun. Rev.*, XVI, 571-576 (Sept., 1927).

² F. M. Davenport (former member of the New York senate), "Impressions of a Modern Legislature," *Outlook*, CXXII, 286-292 (June 18, 1919).

plished, and this continues to be one of the numerous unsolved problems of American state government.³

CHAP.
XXXVII

REFERENCES

- W. F. Dodd, *State Government* (New York, 1922), Chap. viii.
 J. M. Mathews, *American State Government* (New York, 1924), Chap. vii.
 A. N. Holcombe, *State Government in the United States* (New York, 1916, 1926), Chap. ix.
 R. Luce, *Legislative Procedure* (Boston, 1922), Chaps. v-viii, ix-x, xxi-xxii, xxv.
 ———, *Legislative Assemblies* (Boston, 1924), Chaps xvii-xxv.
 P. O. Ray, *An Introduction to Political Parties and Practical Politics* (3rd ed., New York, 1924), Chaps. xviii-xix.
 J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chaps. xlii-xlv.
 P. S. Reinsch, *American Legislatures and Legislative Methods* (New York, 1907), Chaps. v-vi, viii-x.
 E. Kimball, *State and Municipal Government in the United States* (Boston, 1922), Chap. xi.
 A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), II, 338, 341, 632; III, 239-240, 398-401.
 J. T. Young, *The New American Government and Its Work* (New York, 1913), 643-651.
 C. L. Jones, "Changes in Legislative Procedure in 1913," *Amer. Polit. Sci. Rev.*, VIII, 240-244 (May, 1914).
 A. E. Sheldon, "Reform of Legislative Procedure in Nebraska," *ibid.*, XII, 261-265 (May, 1918).
 H. White, "Can Legislatures Learn from City Councils?" *ibid.*, XXI, 95-100 (Feb., 1927).
 J. O. Hammitt, "Watching Legislation for the Public," *Nat. Mun. Rev.*, III, 360-366 (April, 1914).
 R. V. Harlow, *History of Legislative Methods before 1825* (New Haven, 1917).
 E. Bede, "Our Legislative Mills: Oregon," *Nat. Mun. Rev.*, XII, 536-541 (Sept., 1923).
 W. Thompson, "Our Legislative Mills: Wisconsin," *ibid.*, XII, 600-610 (Oct., 1923).
 T. Finty, Jr., "Our Legislative Mills: Texas Makes Haste," *ibid.*, XII, 649-654 (Nov., 1923).
 R. S. Boots, "Our Legislative Mills: Nebraska," *ibid.*, XIII, 111-119 (Feb., 1924).
 N. Alexander, "New Hampshire, the State with the Largest Legislative Body," *ibid.*, XIII, 306-313 (May, 1924).
¹J. Quincy, "Regulation of the Lobby in Massachusetts," *Forum*, XII, 346-357 (Nov., 1891); M. Storey, "The American Legislature," *Albany Law Jour.*, L, 187-197 (Sept. 22, 1894); J. K. Pollock, Jr., "The Regulation of Lobbying," *Amer. Polit. Sci. Rev.*, XXI, 335-341 (May, 1927); P. S. Reinsch, *Readings on American State Government*, 79-84; R. Luce, *Legislative Assemblies*, Chap. xvii; Governor H. S. Johnson's *Message to the Eleventh Legislature of the State of Oklahoma* (1927), 24-27.

734 INTRODUCTION TO AMERICAN GOVERNMENT

CHAP.
XXXVII

- A. W. Edson and R. C. Hardy, "The New Hampshire Legislative Session of 1925," *Amer. Polit. Sci. Rev.*, XIX, 773-784 (Nov., 1925).
- M. H. Merrill, "The Oklahoma Legislature," *Southwestern Polit. Sci. Quar.*, III, 113-125 (Sept., 1922).
- H. W. Toll, "The American Legislators' Association," *Amer. Bar Assoc. Jour.*, XII, 642-643 (Sept., 1926); *Amer. Polit. Sci. Rev.*, XXII, 127-129 (Feb., 1928).

CHAPTER XXXVIII

THE STATE EXECUTIVE

To carry into effect public policy which has been enacted into law, and to perform other duties prescribed by the constitution and the statutes, two main groups of state offices are everywhere provided. The first usually consists of the offices of governor, lieutenant-governor, secretary of state, auditor or comptroller, treasurer, attorney-general, and superintendent of public instruction, which are regularly created by the constitution, and which are commonly called the state executive offices. The second consists of newer boards, commissions, and offices, established, as a rule, by statute, and usually known as the state administrative organs or agencies. Both groups exist for the same fundamental purpose, *i.e.*, to carry into effect public policy which has been embodied in law; and the distinction between them is not hard and fast. It is not unusual, for example, to speak of all the activities carried on by the non-legislative and non-judicial parts of the state government as "state administration." None the less, it will make for clearness if we take account first of those offices that are essentially executive, and reserve the administrative services proper for treatment in the succeeding chapter.

Executive
and admin-
istrative
offices

No one needs to be told that the most important executive officer of a state is the governor. Every colony in the days before the Revolution had a governor, and, notwithstanding popular dislike of the power which that official wielded, every one of the new state constitutions provided for a continuance of the office, albeit with authority considerably reduced.¹ The organized territories of later times had governors, and all carried the office over into their new state organization as a matter of course. In only two

The gov-
ernor

¹"It never occurred to our forefathers that there was a vast difference between a governor appointed by a king and a governor elected by the people. They never stopped to think that a governor who held his office at the will of the people would be apt to observe the interests of those who could work his political ruin. In their opinion, based upon previous experience, governors were inclined to act arbitrarily and contrary to the wishes of the people. Thus developed the early policy of granting little power to the executive departments of the government. . . ." W. F. Dodd in *Constitutional Conventions in Illinois* (1920), 10.

CHAP.
XXXVIII

Election

of the colonies, as we have seen, was the governor elected, even indirectly, by the people; and in a majority of the original thirteen states choice was made by the legislature. The plan of popular election, however, gradually won its way, and it nowadays prevails in every one of the forty-eight states.¹ Candidates are nominated either in state-wide direct primaries in which every properly registered voter of each party is entitled to participate or by state conventions made up of delegates selected by the members of each party in such subdivisions of the state as counties and congressional or legislative districts. Ordinarily a plurality elects, although in a few states a majority is required; in the latter case there is provision for choice by the legislature in the lack of a popular majority of any one of the candidates.

Qualifica-
tions,
salary, and
term

All state constitutions require the governor to have certain qualifications. He must always be a citizen of the United States; and in all but a few states he must be at least thirty years of age. Usually he must have resided in the state for a period of five years. His compensation is either definitely fixed in the constitution or left to the discretion of the legislature. At the present time, salaries range from \$3,000 up to \$10,000 in five states,² \$12,000 in Illinois, \$18,000 in Pennsylvania, and \$25,000 in New York. In twenty-four states the governor's term is fixed in the constitution at four years; in twenty-three states, at two years; while New Jersey elects every three years. The newer constitutions show a tendency to change from the two-year to the four-year term.³ As a rule, the governor is eligible for immediate reelection, and for reelection any number of times; but in Indiana, Pennsylvania, and some other states he may not serve two consecutive terms.

Removal

The governor and other principal state officers may be removed by impeachment. But the power is seldom exercised, as is indicated by the fact that only ten governors have ever been impeached. Five of these impeachments occurred in the South during the Reconstruction period: one governor was removed from office, one resigned to avoid removal, and in the other cases the charges were dropped. In the North, two governors were impeached during the same period, one being acquitted, and the other removed from

¹ Except in Mississippi, where popular election is combined with legislative action.

² California, Massachusetts, New Jersey, Ohio, and West Virginia.

³ South Carolina adopted a constitutional amendment in 1924 raising the governor's term from two to four years.

office for embezzlement of state funds.¹ The only later instances are the impeachments of Governor Sulzer of New York in 1913, Governor Ferguson of Texas in 1917, and Governor Walton of Oklahoma in 1923, all of whom were removed from office.² In eleven states a new and more expeditious mode of removing principal state officers has been adopted in recent years, known as the "recall." This takes the form of a special election held after a petition has been signed by a specified number of voters asking for such an election, and after rival candidates have been placed in nomination. If one of the latter receives more votes than the governor or other official whose removal is sought, the incumbent is said to be "recalled," and the successful candidate succeeds to the office and serves out the unexpired term.³ Down to 1928, only one governor, and only three other executive officials, voted for by the people of an entire state, had been recalled.⁴

The recall

In case of the governor's death, resignation, removal, or absence from the state, the lieutenant-governor, in two-thirds of the states, succeeds to the office. This, however, is never true when the governor has been recalled; the successor is then the rival candidate who polled the highest popular vote at the recall election. When there is a vacancy in the lieutenant-governorship, or where that office does not exist, the succession follows some order which is laid down in the constitution or the statutes; the president of the senate usually succeeds, and after him the speaker of the house.

Although the legislature is the chief organ for the enactment of state laws, it is not the only part of the government that partakes of that function. Some legislative authority is exercised in every state by what are called quasi-legislative boards or commissions, upon which has been conferred the right to issue ordinances or regulations having the force of laws and applying to the operation of public utilities and other corporations, to the

¹ A. N. Holcombe, *State Government in the United States* (2nd ed., 1926), 334.

² On the Sulzer case, see *Amer. Year Book* (1913), 53-55; on the Ferguson case see *Amer. Polit. Sci. Rev.*, XII, 111-115 (Feb., 1918); on the Walton case see *Southwestern Poli. Sci. Quar.*, IV, 319-332 (Mar., 1924), Cf. C. S. Potts, "Impeachment as a Remedy," *St. Louis Law Rev.*, XII, 15-38 (Dec., 1926); M. T. Van Hecke, "Impeachment of Governor at Special Sessions," *Wisconsin Law Rev.*, III, 155-169 (Apr., 1925).

³ See pp. 857-860.

⁴ Governor Frazier, the attorney-general, and the commissioner of agriculture in North Dakota, in 1921; and a member of the state public utility commission in Oregon, in 1922. See D. H. Carroll, "The Recall in North Dakota," *Nat. Mun. Rev.*, XI, 3-5 (Jan., 1922); J. D. Barnett, "Fighting Rate Increases by the Recall," *ibid.*, XI, 212-213 (July, 1922).

CHAP.
XXXVIIIThe gov-
ernor and
legislation

protection of the public health, and to a large variety of other matters.¹ But a far more important subsidiary agency in law-making is the governor. Indeed, as a factor in legislation he is scarcely second to the legislature itself; for, although his legal authority in this field is largely of a negative character, he is often able in various ways to exert much positive influence in determining both the form and the substance of the laws that are passed.

1. The veto

The desirability of giving the governor some official share in the formulation of the public will into law is practically everywhere recognized by granting him the veto power. Originally the states bestowed this power grudgingly, or not at all; of the earliest state constitutions, only those of Massachusetts, New York, and South Carolina made provision for it.² Nowadays, however, it appears in every state except North Carolina; and it enables the governor to exert a tangible influence in legislation which is equivalent to not less than that of one-half of the legislature, with the single limitation that it can be employed only in the negative.

Period
allowed for
executive
considera-
tion of bills

Before any bill passed by the legislature becomes a law it has to be submitted to the governor, and if he vetoes it, it fails unless the legislature passes it a second time by the requisite majority. The time allowed the governor for consideration of bills varies from state to state: during the legislative session, in eleven states he has only three days; in twenty-two states he has five days; in three states, six days; and in eleven states, ten days. If he fails either to approve or veto a bill within this period, it becomes law automatically. If, however, the legislature adjourns within this time, the bill, in twenty-one states, fails to become law unless the governor subsequently approves it; the governor thus has a "pocket veto," or veto by inaction, corresponding to that enjoyed by the president of the United States.³ On the other hand, in Maine and five other states,⁴ if the legislature adjourns within the period allowed for consideration, bills become laws unless the governor returns them with his objections at the beginning of the next legislative session.

Of more importance is the length of time allowed for the consideration of bills after the legislature adjourns; for the bulk of

¹ U. G. Dubach, "Quasi-Legislative Powers of State Boards of Health," *Amer. Polit. Sci. Rev.*, X, 80-95 (Feb., 1916).

² See p. 89.

³ See p. 263.

⁴ Florida, Indiana, Mississippi, Nevada, and South Carolina.

legislation is passed shortly before adjournment. In thirty-four states the governor is given a definite time following adjournment, ranging from six to thirty days, in which to approve or disapprove measures that have been passed. In twenty-three of these states, bills become law unless the governor records his disapproval within a specified period. In the other states, notably California and New York, no bill becomes a law unless approved by the governor within that period. "In such states the governor sits after the close of the legislative session practically as a third chamber. He grants hearings to advocates and opponents of measures which have received legislative approval, refers legal and financial questions to his attorney-general or other advisers, and in general does what he can to determine for himself whether the measures proposed by the legislature should be enacted."¹

CHAP.
XXXVIII

The size of the vote required in the legislature to overcome the governor's veto also varies: in Connecticut a mere majority of a quorum in each house suffices, and in seven other states a majority of the full membership is adequate; in five states a three-fifths vote is required; elsewhere a two-thirds vote is necessary, based, in twelve states, on the number present, and in the remaining twenty-two, on the total membership.

Bills passed
over the
veto

The scope of the veto power, likewise, differs. In many states a bill must be accepted or rejected as a whole, even though some parts of it may be deemed good and others bad. In the case of appropriation bills, this has often resulted in forcing the governor to accept an entire measure, including items unnecessarily large or for unworthy projects, or else to veto the entire bill and thus perhaps delay indefinitely the voting of necessary funds for carrying on the state government. In such a situation most governors have preferred to accept the former alternative. To enable the governor to check the common legislative tendency toward wastefulness, extravagance, and expenditures for purely local objects, all but ten of the states have now conferred upon him the right to veto separate items in appropriation bills. In Pennsylvania and a few other states this has been construed to permit the governor, not only to strike out separate items, but to reduce the amount of any item. This latter development may work out badly, as it has done in Pennsylvania, where the legislature has been able to gratify local constituencies by voting appropriations far in excess of the

Extent of
the veto
power

¹ A. N. Holcombe, *State Government in the United States* (2nd ed., 1926), 318.

estimated revenues of the state, thus transferring to the governor the burden of whittling down the appropriations and of shouldering whatever local unpopularity may result.¹ Two states, Washington and South Carolina, have gone so far as to permit the veto of any section or sections of any bill passing the legislature.

"Grading the states according to the apparent strength of the veto provisions in their constitutions, the first rank would be given to New York, Pennsylvania, Missouri, California, and Colorado. In each of these states the governor may veto items in appropriation bills, he has ten days for the consideration of bills during the session of the legislature, and thirty days at the close of the session, and a two-thirds vote of the total membership of each house is required to pass a measure over his objections. At the other end of the list, the states where the veto power appears to be the most restricted are Connecticut, Indiana, and Tennessee. In none of these can the governor veto appropriation items,"² the time for consideration of measures is only three or five days, and a majority vote is sufficient to override a veto.

Frequency
with which
the veto
is used

The extent to which use is made of the veto depends upon the political and personal relations between the governor and the legislature, and especially upon the nature of the veto power itself. Vetoes are naturally most numerous in those states in which it is possible to disallow separate items in appropriation bills; in 1915 there were almost ten times as many vetoes in those states in proportion to the total number of bills passed as in the states where the veto is more restricted. In the one group, the veto was applied to the whole or to parts of about one measure in seven; in the other, to only about one bill in seventy. Altogether, more than a thousand separate bills or parts of bills were vetoed in that year. The largest number was in California, with 225 out of 996 bills passed; Pennsylvania, with 211 out of 1,003 bills; and New York, with 233 out of 980 bills. On the other hand, in Rhode Island there were no vetoes, and there was only one in each of four other states. In only five states were any bills or parts of bills reenacted after the governor vetoed them; these numbered only twenty-two, or

¹ R. H. Wells, "The Item Veto and State Budget Reform," *Amer. Polit. Sci. Rev.*, XVIII, 782-791 (Nov., 1924); A. Reppy, "The Power of the Executive to Split an Item of an Appropriation Bill," *Texas Law Rev.*, IV, 182-207 (Feb., 1926).

² J. A. Fairlie, "The Veto Power of the State Governor," *Amer. Polit. Sci. Rev.*, XI, 484 (Aug., 1917). Connecticut adopted the item veto in 1924.

about two per cent, out of a total of 1,066 votes.¹ In 1923, when forty-four legislatures were in session, the veto was applied to about 1,100 entire measures, or about seven per cent of the total number passed, and to about 1,000 parts of bills, mostly items in appropriation bills. "The governor of California disapproved 411 measures out of a total of 890 acts passed by the legislature, and he also vetoed or reduced 49 items of appropriations. In New York, 196 bills out of 1,098 and 18 items, and in New Jersey, 78 out of 251 bills, were the objects of executive disapproval. At the other extreme there were two votes in Florida and Vermont, three in Massachusetts, and four in Iowa."² The governor's veto was overridden in only 104, or nine per cent, of the cases where entire acts had been vetoed, and in only 40, or about four per cent, of the instances when items had been disapproved. Most of the unsuccessful vetoes occurred in four states—Kansas, Maine, New Jersey, and Ohio—where a pronounced lack of harmony existed between the governor and the legislature.³

CHAP.
XXXVIII

The full effectiveness of the veto is even greater than is indicated by the large number of bills vetoed and the small number passed a second time. A mere hint from the executive office that a veto may be expected if a certain bill passes is often sufficient to kill it; and frequently something more than a hint to this effect is forthcoming. The possibility of a veto often impels members of the legislature to ascertain what the governor's attitude is likely to be before they even introduce a measure which they have in mind. Furthermore, in informal conferences with members of the legislature, or in more formal committee hearings, the governor may suggest amendments which must be made in order to render a bill satisfactory to him. Not infrequently, also, a veto message points out specific objections to certain parts of a bill, and new bills are introduced and passed with the objectionable feature omitted or amended. In such ways, the governor's power in legislation, which in law is of a purely negative character, may be transformed, without changing a letter of the constitution, into a positive, affirmative, influence; although it should be added that Alabama, Virginia, and Massachusetts have inserted in their constitutions provisions which definitely authorize the governor to

Indirect
effects of
the veto
power

¹ Holcombe, *op. cit.* (1913), 327-328. In Illinois only two bills have been passed over the governor's veto since the adoption of the present constitution in 1870.

² A. N. Holcombe, *op. cit.* (2nd ed., 1926), 316.

³ *Ibid.*, 317.

propose amendments to bills which might otherwise incur a veto. Obviously, executive influence of this kind can be exerted only upon bills which are considered some time in advance of the close of a session; it does not affect the great number of bills regularly put through on the eve of adjournment. None the less, possession of the veto has incalculably strengthened the arm of the governor whenever he has undertaken to exercise an affirmative influence upon legislation by taking the lead in initiating and putting through a legislative program which is demanded or approved by intelligent public opinion.¹

2. Special
sessions of
the legisla-
ture

But the real starting point for this positive or affirmative influence of the governor upon legislation is to be found in his right to call special sessions of the legislature and to send formal messages to the two houses whenever they are in session. In about half of the states the legislature, when convened in special session, may consider only the subjects which have been included in the governor's call. Hence, by specifying certain topics in his summons, the governor may practically compel the legislature to consider these matters and to put itself more or less fully on record concerning them.²

3. Messages

Every state constitution likewise contains a clause requiring the governor to inform the legislature from time to time, by messages and addresses, upon the condition of state affairs.³ Like similar communications of the president to Congress, these messages are not infrequently addressed over the heads of the legislators to the people at large, in the hope of creating public sentiment that will compel the legislature to enact measures which otherwise it might be reluctant to pass. By restricting his messages to a few

¹ See J. A. Fairlie, "The Veto Power of the State Governor," *Amer. Polit. Sci. Rev.*, XI, 473-493 (Aug., 1917); N. H. Debel, "The Veto Power of the Governor in Illinois," in *Univ. of Ill. Studies*, VI, Nos. 1-2 (1917); J. A. Swisher, "The Executive Veto in Iowa," *Iowa Jour. Hist. and Polit. Sci.*, XV, 155-213 (Apr., 1917); K. E. Carlson, "The Exercise of the Veto Power in Nebraska," *Univ. of Neb. Hist. and Polit. Sci. Ser.*, Bull. No. 12 (1917).

² Oklahoma adopted a constitutional amendment in 1923 empowering the legislature to convene in special session upon a call signed by a majority of the members of the lower house. Subsequently the amendment was declared invalid by the state supreme court. *Simpson v. Hill et al.* (1927), 263 Pacific, 635-645 (1928). A. J. Lien, "Convening the Special Session—Oklahoma's Predicament," *Nat. Mun. Rev.*, XVII, 139-141 (Mar., 1928).

³ Recent messages of the governors of the several states are summarized in *Amer. Polit. Sci. Rev.*, XV, 253-258 (May, 1921); *ibid.*, XVI, 276-284 (May, 1922); *ibid.*, XVII, 231-260 (May, 1923); *ibid.*, XVIII, 296-305 (May, 1924); *ibid.*, XIX, 309-324 (May, 1925); *ibid.*, XX, 330-339 (May, 1926); *ibid.*, XXI, 318-335 (May, 1927).

definite recommendations embodying policies which his party has endorsed in its platform, or policies for which he is individually willing to assume responsibility,¹ the governor may become an influence of prime importance in shaping legislation; and he is the more likely to do so if he takes the trouble to have bills drafted incorporating his recommendations. He need never fail to find some member of the legislature who will be willing to introduce the measures thus prepared; and it sometimes happens, as in the Illinois legislature of 1913,² that bills thus originating with the governor or executive departments are given a specially favored position upon the legislative calendar. Whether the governor's recommendations or bills receive favorable consideration depends largely upon his tactfulness, his persuasiveness in winning over members and party leaders, the extent of the popular support back of his measures, and, not infrequently, the vigor with which he wields the veto and uses the patronage at his disposal as clubs to compel the reluctant support of some members. Naturally, his power will go farther, too, if his own party has a majority in the two houses.

CHAP.
XXXVIII

The rapid spread of the movement for state budgetary reform has considerably enhanced the legislative influence of the governor. A large majority of the states which have recently adopted improved budgetary methods have recognized both the appropriateness and the importance of assigning to the governor the leading part in the preparation of the state budget. No other official or group of officials can perform this work so satisfactorily; the governor is held responsible for the economical and efficient conduct of the state government and is in a position to know more intimately than any other state official the needs of the various administrative branches and state institutions. Upon him, therefore, or upon some officer directly responsible to him, has rightfully been imposed the duty of collecting from the various departments and institutions estimates of their needs for the ensuing fiscal period, of revising these estimates, of forecasting the probable revenues of the state and the amounts required to be raised by taxation, and

4. Budget
making

¹Indiana experience shows that the recommendations of the governor have more frequently been enacted by the legislature than measures recommended in party platforms. See B. Y. Berry, "The Influence of Party Platforms on Legislation in Indiana," *Amer. Polit. Sci. Rev.*, XVII, 51-70 (Feb., 1923).

²*Ibid.*, VII, 239 (May, 1913).

CHAP.
XXXVIIIObstacles
to the gov-
ernor's
leadershipProposed
remedies

of submitting this information to the legislature in good form as a basis for intelligent action by that body.¹

Notwithstanding the theory of separation of powers on which our state governments are based, the public has, in the past twenty years, come to look more and more upon the governor as a legislative leader and to hold him responsible for having, and for putting through, a definite program of legislation, very much as the country at large has come to hold the president responsible for getting legislation through Congress.² The governor, however, is always handicapped in his legislative leadership, as is the president, by the practical restriction of his direct contact with the legislature to personal interviews, and by being obliged to entrust the explanation and defense of his measures in each house to some member thereof. Manifestly, his influence as a leader in law-making would be much increased, and a greater degree of harmony and coöperation between the executive and legislative branches would be attained, if the governor and the heads of executive departments were given the right to introduce bills on their own responsibility and to sit in the legislature, although without a vote. This arrangement would carry with it the privilege of explaining and defending their recommendations and bills, and would afford them opportunity to impart first-hand information and to answer any questions that might arise in the course of debate. Thus far the only important step taken in this direction was the inclusion in

¹For the effect of the movement for budget reform upon the governor's veto, see *Amer. Polit. Sci. Rev.*, XVIII, 782-791 (Nov., 1924). Budget reform will be considered further in Chap. XL.

²Woodrow Wilson gave clear expression to his view of the governor's function as legislative leader soon after his election as governor of New Jersey. The leaders of his party in the legislature had called a conference to consider a legislative program, and Mr. Wilson attended without being invited. His presence precipitated a debate over the propriety of the governor's taking part in such a conference. Finally Mr. Wilson rose and said: "Gentlemen, I have been elected governor of New Jersey by the people of New Jersey, selected by the convention of the Democratic party, and I thereby have become the responsible leader of the Democratic party in the state. I will be held responsible by the people at the polls. I will be held responsible for the administration of the affairs of the state of New Jersey. Each of you gentlemen will be held responsible in the districts where you are elected. I am held responsible as well as you by the same people. I am the only person in the whole state, however, to express approval or disapproval on behalf of all the people, and I will express that approval or disapproval for the people by determining what we should do." The governor then laid before the conference a comprehensive program of legislation, and remained on his feet nearly three hours arguing and answering questions; with the result that the conference unanimously adopted his program, and within a short time the measures were enacted into law. David Lawrence in Springfield (Mass.) *Republican*, February 29, 1924. See also J. M. Mathews, "The New Role of the Governor," *Amer. Polit. Sci. Rev.*, VI, 216-228 (May, 1912).

the budget amendment to the New York constitution, adopted in 1927, of a provision authorizing the governor and heads of departments to appear before the legislature and be heard on any matter pertaining to the budget.¹ If, however, we continue to hold the governor responsible for putting through a legislative program—as we probably shall—we cannot fairly deny him direct and public access to the law-making body, although this innovation may have to await, in most states, the action of a constitutional convention or the adoption of a popularly initiated amendment. But, once the plan is tried, its rapid spread among the states, either by constitutional amendments or by the voluntary action of the legislatures themselves, may be predicted with some degree of confidence. With a view to strengthening the position of the governor as legislative leader and preventing deadlocks between the governor and the legislature, it has been proposed that the chief executive be given the right to order a popular referendum upon measures which he has recommended and which fail to pass the legislature.²

CHAP.
XXXVIII

Thus far our attention has been fixed upon the governor's relations with the law-making branch. His position as chief executive, however, calls equally for attention; after all, his primary function is executive. The first thing to be observed in this connection is that, although commonly charged with the duty of seeing that the laws are faithfully executed, the governor enjoys little or no inherent authority derived from the mere fact that he is the chief executive of the state. His position in relation to the state administration is therefore distinctly inferior to that of the president in relation to the national administration. The federal constitution broadly bestows "*the executive power*" of the United States upon the president; but no corresponding clause in state constitutions concentrates executive power in the governor, giving him an indefi-

Executive
powersRestricted
character

¹ This amendment is reprinted in A. N. Holcombe, *State Government in the United States* (2nd ed., 1926), 602-603.

² The Model State Constitution of the National Municipal League (1921) provides that the governor may order such a referendum upon *any* bill which fails to pass the legislature if it received the support of one-third of the members. It is also provided that a majority in the legislature may order a referendum upon bills which have been vetoed by the governor but which fail of re-passage although supported by a majority (§ 27, and pp. 26-27). A still more radical suggestion is that the governor be permitted, in cases of disagreement over important subjects of legislation, to dissolve the legislature and appeal to the voters for the election of a new legislature more in harmony with his program, much as the English prime minister is able to bring about a dissolution of the House of Commons, followed by an appeal to the country for a popular mandate. See F. W. Coker, "Interworkings of State Administration and Direct Legislation," *Annals Amer. Acad. of Polit. and Soc. Sci.*, LXIV, 122-133 (March, 1916).

nite sphere of executive influence. On the contrary, the executive authority in state government is shared by a number of officers. State constitutions frequently say expressly that the executive branch of the government shall consist of the governor, lieutenant-governor, and various other officers mentioned by title, and that merely the "supreme" [or chief] executive power belongs to the governor. Such provisions, combined with the tendency of the courts to construe grants of power in state constitutions rather narrowly, have left the governor with practically no executive authority which is not clearly granted by some definite provision in the constitution or by some statute.

Dependence
upon subor-
dinates

In carrying out the constitutional mandate to see that the laws are faithfully executed, the governor is obliged to rely upon a great number of subordinates, chiefly the state executive officers (generally chosen by popular vote), the locally-elected sheriffs, prosecuting attorneys, and city officials, and the judges of the various state courts.¹ In order that the governor may fully and effectually obey the constitutional injunction, it is essential (1) that he be given a free hand in the selection of these subordinates; (2) that he be able to supervise and direct them in the performance of their duties; and (3) that he be empowered to suspend or remove an official who proves incompetent or unfaithful. Unfortunately, in no state is the governor given any such full and effective means of control over these law-enforcing agencies. On the contrary, he enjoys a very limited power of appointment, a wholly inadequate power of supervision and direction, and a narrowly restricted right of suspension and removal.

The power
of appoint-
ment

The appointing power of the governor is derived both from the constitution and from statutes. In the former there is commonly a clause specifying certain officers whom the governor may appoint; but in most instances his constitutional appointing power is derived from a general clause authorizing him to appoint all officers whose appointment or election is not otherwise provided for. To other positions he appoints by virtue of direct legislative authorization. The number of places which the governor may fill runs well into the hundreds in such states as New York, Pennsylvania, and Illinois; and it always tends to increase whenever the governor and the majority in the legislature belong to the same

¹ See W. F. Dodd, *State Government*, Chap. XI; J. M. Mathews, *American State Government*, Chaps. VIII, XV.

party, and tends to decrease whenever they belong to different parties.

CHAP.
XXXVIII

However broad the governor's power of appointment, it seldom extends to the most important executive officers, commonly called the heads of departments, such as the secretary of state, the attorney-general, the treasurer, the auditor or comptroller, and the superintendent of public instruction. These officials are usually elected by the people,¹ a practice which has been characterized as "a relic of the outworn idea that one-man power is dangerous, and that the heads of departments, instead of being the effective instrumentalities of the governor, should be checks upon him." That there should be some check upon the governor is perhaps true. But it should come from the other departments of the government, and from his responsibility to the people, and not from officers in his own department.²

Chosen independently of the governor, and for fixed terms, these principal executive officers may fail to coöperate with their nominal chief and are then in a position to embarrass him and to impair the efficiency with which the state's affairs are administered. Especially is this likely to be the case when one (or more) of these officers belongs to a different political party or to a different faction in the same party from that of the governor. When all belong to the same party, the friction which inevitably tends to arise between officers who are legally independent of the governor and of each other may be avoided or greatly reduced and some measure of team-work ensured through the harmonizing influence of party fellowship. Having their duties almost wholly prescribed by law, these state officials nowhere occupy the same relation of subordination toward the governor that the heads of the national executive departments occupy with respect to their chief; they never constitute a body of legal and political advisers to the governor corresponding to the president's cabinet.

By far the greater part of the governor's appointing power arises in connection with the statutory boards and commissions which have appeared everywhere in great numbers in recent decades. In filling these administrative offices, however, the governor seldom has a free hand; for the most important positions he must obtain confirmation of his appointments by an executive

Limitations
on the
appointing
power

¹ In Maine, the governor and auditor, and in New Hampshire, New Jersey, and Tennessee, the governor, are the only state executive officials elected by the voters of the entire state.

² J. M. Mathews, *Principles of American State Administration*, 84.

council¹ or, more commonly, by the state senate—a requirement which is open to many of the objections which have been cogently urged against councilmanic confirmation of appointments by the mayor in our cities.² Other limitations, too, impair the effectiveness of the appointing power as a means of control over administrative officials, *e.g.*, civil service laws, laws prescribing specific qualifications for appointees, and especially laws fixing definite and overlapping terms, which often make it impossible for the governor to appoint a majority of the members of a board or commission during a single term in office. All of these provisions more or less restrict the governor's choice of the officials whose duty is to assist him, directly or indirectly, in the enforcement of the laws, and therefore tend to weaken his control over them. On the whole, the governor's power of appointment, especially where subject to senatorial confirmation, has not contributed materially to strengthen his position as the head of the state administration, and often has been a positive source of weakness.

The powers
of direc-
tion and
removal

The governor's control is further lessened by the fact that he has little or no power of direction over the other executive and administrative officials, the reason being that in most states the conduct of administration is prescribed by law "with infinite and not always intelligible detail." Whatever power of direction he enjoys must ordinarily be derived from a specific grant in the constitution or the statutes, and a commendable tendency has recently appeared in some states to increase his authority in this respect. Of much greater potential importance, as an agency of control, is the governor's power to suspend or remove appointive officials, although this, too, is quite insignificant in comparison with the president's power of removal. Like the power of direction, the power of removal must generally be derived from some specific grant of authority in the constitution or statutes. Furthermore, the exercise of this power, when authorized, is often so hedged about as to be very ineffective.³ The principal elective state officials can, as a rule, be removed only by the cumbersome process of impeachment. Even when the governor is authorized to remove or suspend them, an effective check upon the exercise of the power is imposed in a number of states through the requirement that

¹ Executive councils exist only in Maine, New Hampshire, Massachusetts, and North Carolina.

² See Chap. XLVI.

³ See A. F. MacDonald, "The Governor and the Public Service Commission of Pennsylvania," *Nat. Mun. Rev.*, XV, 185-186 (Mar., 1926).

removals must have the approval of the senate. In New York, for example, the principal elective state officials can be removed only by a two-thirds vote of all the members elected to the senate, a requirement which more than once has served seriously to embarrass the governor. Over local officers the governor has, in most states, little or no control, although in New York, Michigan, Minnesota, Ohio, and Wisconsin he can remove certain of them.¹

In addition to the legislative and executive powers here considered, the governor is clothed with certain miscellaneous powers, such as the control of the state militia, the granting of pardons and reprieves,² and the calling of special elections to fill vacancies. He is also an *ex-officio* member of a large number of state boards and commissions, and is the medium through which official communications are carried on with other states and with the national government. Unfortunately, most of the governor's time is consumed in the performance of comparatively trifling ministerial duties instead of being devoted to an intensive study of the big problems in the fields of legislation and administration. The present (1928) governor of New York has testified that he is compelled to spend approximately seventy-five per cent of his time doing clerical work, signing papers, and listening to reports, matters which might well have been delegated to a competent subordinate.³

Miscellaneous
powers

A lieutenant-governor is provided for in thirty-five state constitutions.⁴ In general, his functions are (1) to succeed the governor in the event of the latter's death, removal, absence, disability, or impeachment, and (2) to preside over the deliberations of the senate, and incidentally to have a casting vote in case of a tie (except in Michigan). In some states he has the right to participate in senate debates, to vote when the senate is in committee of the whole, and to serve *ex-officio* as a member of the governor's

The
lieutenant-
governor

¹See W. F. Dodd, *State Government*, 286-288; W. H. Edwards, "Governor Donahey and the Ohio Mayors," *Nat. Mun. Rev.*, VIII, 350-356 (June, 1924).

²J. D. Barnett, "The Grounds of Pardon," *Jour. Crim. Law and Criminol.*, XVII, 490-530 (Feb., 1927); M. T. Van Hecke, "Pardons in Impeachment Cases," *Michigan Law Rev.*, XXIV, 657-673 (May, 1926); E. Morris, "Some Phases of the Pardoning Power," *Amer. Bar Assoc. Jour.*, XII, 183-190 (Mar., 1926). During Mrs. Ferguson's term as governor in Texas (1925-27), 3,737 pardons were granted, an average of more than five a day.

³Alfred E. Smith, "How We Ruin Our Governors," *Nat. Mun. Rev.*, X, 277-280 (May, 1921).

⁴The states that have no lieutenant-governor are Arizona, Arkansas, Florida, Georgia, Maine, Maryland, New Hampshire, New Jersey, Oregon, Tennessee, Utah, West Virginia and Wyoming. In four of these (Arizona, Oregon, Utah, and Wyoming), the secretary of state succeeds to the governorship; elsewhere the succession passes to the president of the senate or the speaker of the house.

council. On the whole, the office, when not useless, is unimportant, and the thirteen states that have no lieutenant-governor have not experienced any resulting inconvenience.¹

Space permits only the barest summary of the duties of the other principal executive officers.² There is always a secretary of state, or secretary of the commonwealth, who is the custodian of the state archives and the state seal. He also has charge of the publication of the laws, countersigns the proclamations and commissions issued by the governor, issues certificates of incorporation to corporate bodies of various kinds, has important duties in connection with primaries and elections, and performs a great variety of miscellaneous duties. The secretary is elected by popular vote except in Delaware, Maryland, New Jersey, Pennsylvania, and Texas, where he is appointed by the governor; and in Maine, New Hampshire, and Tennessee, where he is chosen by the legislature.

Other
executive
officers

The state treasurer is merely the custodian of the revenues and trust funds of the state,³ which he pays out for objects authorized by law, but only upon the order of the auditor or comptroller. Treasurers are chosen by the legislatures of Maine, Maryland, New Hampshire, New Jersey, and Tennessee, but everywhere else they are elected by popular vote.

The auditor or comptroller (found in all but three states) has much greater power than the treasurer, for he not only audits the accounts of all state officers charged with the collection or disbursement of state funds, but passes in the first instance upon the legality of all expenditures. No money may be drawn from the public treasury without warrant previously issued by him. He is elected by popular vote except in New Jersey, Tennessee, and Virginia, where he is chosen by the legislature. In Oregon and Wisconsin the secretary of state is *ex-officio* auditor; and in New Hampshire, warrants on the treasury are drawn by the governor, who annually appoints a committee of the executive council to audit the accounts of the state treasurer.⁴

The superintendent, or commissioner, of public instruction has

¹ The office is omitted in the Model State Constitution. See C. Kettleborough, "Powers of the Lieutenant-Governor," *Amer. Polit. Sci. Rev.*, XL, 88-92 (Feb., 1917); and *Nat. Mun. Rev.*, X, 403, 409-410 (Aug., 1921), "Why a Lieutenant-Governor?" and "How to Save Our Governors from Ruin."

² These are more fully discussed in J. M. Mathews, *Principles and Methods of American State Administration*, Chap. vi, and W. F. Dodd, *State Government*, Chap. ix.

³ See M. L. Faust, *The Custody of State Funds* (New York, 1925).

⁴ J. M. Mathews, *Principles of American State Administration*, 146-147.

charge of the general educational interests of the state. He supervises the administration of the school laws, apportions the school funds among cities, townships, or school districts, conducts investigations, and makes reports to the governor and legislature concerning the public school system of the state. Superintendents are elected by popular vote in thirty-three states, and appointed by the governor in seven, and by state boards of education in eight.

The attorney-general, as the principal law officer of the state, prosecutes and defends all actions in which the state has a direct interest, gives legal advice to the governor and other principal state officers, and in some instances exercises supervision over the work of the county prosecuting attorneys. In New Jersey, New Hampshire, and Pennsylvania the attorney-general is appointed by the governor; in Maine, by the legislature; in Tennessee, by the supreme court; elsewhere he is chosen by popular election.

REFERENCES

- J. M. Mathews, *Principles of American State Administration* (New York, 1917), Chaps. II-VI.
 ———, *American State Government* (New York, 1924), Chaps. VIII-IX.
 A. N. Holcombe, *State Government in the United States* (2nd ed., New York, 1926), Chap. x.
 W. F. Dodd, *State Government* (New York, 1922), Chaps. IX-XI.
 J. H. Finley and J. F. Sanderson, *The American Executive and Executive Methods* (New York, 1907), Chaps. V-LX, XIV, XVII.
 E. Kimball, *State and Municipal Government in the United States* (Boston 1922), Chap. VII.
 A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), I, 682-684; II, 91-92; III, 614-615.
 J. Schouler, *Constitutional Studies, State and Federal* (New York, 1904), Chap. VI.
 M. C. Alexander, "Development of the Power of the Executive in New York," *Smith College Studies in History* (1917), 148-233.
 E. M. Sait, "Participation of the Executive in Legislation," *Acad. Polit. Sci. Proceedings*, V, 127-140 (1914).
 W. M. Smithers, "The Use of the Pardoning Power," *Annals Amer. Acad. Polit. and Soc. Sci.*, LII, 61-66 (March, 1914).
 C. Jensen, *The Pardoning Power in the American States* (Chicago, 1922).
 A. N. Holcombe, "The Executive Council, with Special Reference to Massachusetts," *Amer. Polit. Sci. Rev.*, IX, 304-308 (May, 1915).
 H. J. Ford, "Recent Tendencies in American Politics," *ibid.*, XIV, 1-13 (Feb., 1920).
 H. F. Kumm, "Mandamus to the Governor in Minnesota," *Minnesota Law Rev.*, IX, 21-53 (Dec., 1924).
 A. F. MacDonald, "American Governors," *Nat. Mun. Rev.*, XVI, 715-719 (Nov., 1927).

CHAPTER XXXIX

STATE ADMINISTRATION

Growth of
adminis-
trative
agencies

We have seen that one of the most striking developments in government in recent times is the multiplication of activities undertaken, and the consequent expansion of administrative machinery.¹ Nowhere is this phenomenon more in evidence than in the American states; and in turning to consider how state administration is organized and carried on we may well fix attention mainly upon the extent of this expansion, the reasons for it, the results of it, the disadvantages which it entails, and some of the efforts which are being made to overcome them.

State government in earlier days was a simple affair; a half-dozen principal officers, with small staffs of deputies or other assistants, met all executive and administrative needs. After the middle of the nineteenth century, however, functions began to be broadened, and from 1890, and especially 1900, virgin fields of investigation and control were rapidly occupied. In some instances the new machinery required was provided for in constitutional amendments, but in most cases it was created by statute; and the establishment of statutory boards and commissions became easily the most notable feature of state administrative development. From 1900 to 1909 inclusive, the number of boards, commissions, and other agencies created by the legislatures throughout the country averaged between one and two hundred a year; and although the tendency to establish new offices has recently been curbed somewhat, hardly a legislative session passes in any state without the authorization of at least one new administrative body. In 1913 the legislatures of thirty-five states created no less than 236, and in 1915 about 170, new agencies; only five legislatures in each of these years failed to establish at least one. Until very recently, hardly a state could be found which did not have at least two score of these administrative bodies or offices, while in Texas the number was 91 (1925), in Pennsylvania, 105 (1923), in California,

¹ See p. 557.

112 (1919), in Delaware, 117 (1918), in Illinois about 130 (1917), in New York, 187 (1919), and in Massachusetts, 216 (1919).¹

CHAP.
XXXIX

The reasons for this development are not far to seek. Some of the new agencies were created originally for the purpose of collecting and digesting information for the legislature as a basis for intelligent law-making on some highly complicated subject. Others have originated in a desire on the part of the legislature to evade or postpone the solution of some important question, which, therefore, has been turned over to a special board or commission.² Not a few offices have been created mainly or solely with a view to increasing the "spoils" to be distributed as rewards for party services. Again, citizens interested in some project of reform urge the undertaking of new work by the state government; and, instead of studying the existing machinery in order to determine whether the new function might not be properly handled by an existing office, they draw up a statute creating a new agency, and the legislature obligingly passes it. Popular demand for more industrial and social-welfare legislation,³ and for more activity by the state government in promoting agriculture, has been especially productive in this way. Quite a number of new boards and offices, too, spring from the increasing tendency of the state in recent years to assume functions which originally were left to county, city, or town authorities. Lastly, the growth of insurance, banking, and other financial corporations, and of railways and other public service companies, together with the breakdown of the numerous attempts to regulate them by detailed legislative enactments, has resulted in creating boards or commissions in almost every state for the administration of laws designed to regulate such business enterprises. The establishment of these newer administrative agencies has in many instances had the very beneficial effect of securing the advantages of specialization in public affairs and the application of technical knowledge and skill to the regulation of complex social and industrial conditions.⁴

Reasons
for the
increase

¹L. A. Blue, "Recent Tendencies in State Administration," *Annals Amer. Acad. of Polit. and Soc. Sci.*, XVIII, 434-445 (1901); F. H. White, "The Growth and Future of State Boards and Commissions," *Polit. Sci. Quar.*, XVIII, 631-656 (Dec., 1903); J. S. Pardee, "Government Running Wild," *Outlook*, CXI, 618-622 (Nov. 10, 1915); H. J. Ford, "Reorganization of State Governments," *Acad. of Polit. Sci. Proceedings*, III, 30-36 (1913).

²"Legislative Investigations," *Amer. Polit. Sci. Rev.*, XIV, 277-286 (May, 1920); *ibid.*, XVI, 650-658 (Nov., 1922); *ibid.*, XVIII, 553-559 (Aug., 1924).

³W. F. Dodd, *State Government*, 241-244.

⁴Some of the new state functions partake more of the nature of business enterprises than of government, notably as they have been developed in North

Once created—under whatever circumstances—each board or office has shown a tendency to magnify the importance of its activities, and to compete ever more successfully for appropriations for the continuance of its work. As a result, the administrative machinery of most of the states has come to embrace vigorous and more or less costly agencies having to do with each of the following main groups of interests and activities: (1) the enforcement of regulatory laws affecting banks and other financial institutions, insurance companies,¹ railroads, express companies, telephone, telegraph, lighting, street-railway, and other public utilities; (2) sanitation and public health protection; (3) the enforcement of laws regulating the employment of women and children in industry, requiring proper sanitary arrangements and safety devices in industrial and mercantile establishments, and governing the administration of workingmen's compensation and industrial insurance laws and laws for the prevention and adjustment of labor disputes; (4) the supervision and coördination of the work of poor relief in cities, towns, villages, and counties, and the oversight and control of state institutions for the care of the insane, blind, deaf and dumb, and of state prisons and reformatories; (5) the supervision of public educational activities;² (6) the assessment and collection of taxes, and the supervision, in some states, of the financial operations of certain units of local government; (7) the regulation of various callings and professions; (8) the organization and control of the state militia, and of the state police force in about a dozen states;³ (9) the development of better methods of raising

Dakota. See H. Gaston, *The Non-Partisan League* (New York, 1920); C. E. Russell, *The Story of the Non-Partisan League* (New York, 1920); A. A. Bruce, *The Non-Partisan League* (New York, 1921); P. R. Fossum, "The Agrarian Movement in North Dakota," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XLIII (1925). Not a few other states, however, regarded as business concerns, own more property and employ more men and pay out more for labor and materials than any other enterprise operating wholly within their boundaries.

¹ E. W. Patterson, *The Insurance Commissioner in the United States* (Cambridge, 1927).

² W. A. Cook, *Federal and State School Administration* (New York, 1927). Cf. C. C. Maxey, "Higher Education in the Cockpit—Is the State University Part of the Government?" *Nat. Mun. Rev.*, XVI, 16-19 (Jan., 1927).

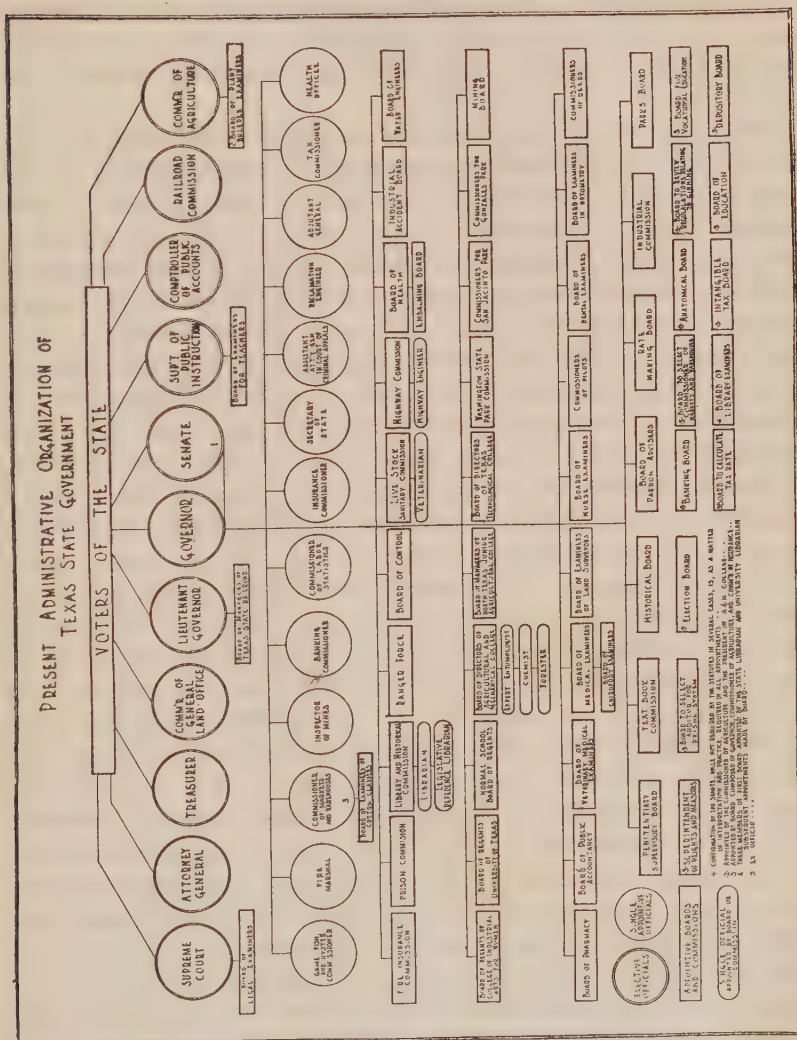
³ The organization of state police forces is one of the most recent and interesting developments in the field of state administration. The best examples of such systems are to be found in Pennsylvania, New York, and Michigan. See P. O. Ray, "Report on State Police," *Amer. Jour. Crim. Law and Criminology*, XI, 453-467 (Nov., 1920); M. Conover, "State Police Developments, 1921-1924," *Amer. Polit. Sci. Rev.*, XVIII, 773-781 (Nov., 1924); M. M. Corcoran, "State Police in the United States, a Bibliography," *Amer. Jour. Crim. Law and Criminology*, XIV, 544-555 (Feb., 1924); B. Smith, "The State Police," *Nat. Mun. Rev.*, XIV, 594-600 (Oct., 1925).

THE GROWTH OF NEW YORK STATE ACTIVITIES

Period	Primary administration	Public works	Public welfare	Education	Regulatory and promotional services
Prior to 1800	Governor and lieutenant governor elected. Secretary of state, comptroller, attorney general and adjutant general appointed by governor and council of appointment. Secretary of state in charge of public records. Treasurer, appointed by legislature, had custody of public funds. Comptroller audited state accounts and drew warrants on treasury. Adjutant general in charge of militia. Attorney general in charge of legal business. Commissioners of land office in charge of state lands.	Surveyor general in charge of survey of public lands.	Substitution of penal servitude for corporal and capital punishment, 1790. Establishment of first state prison, 1790.	Board of regents in charge of establishment and inspection of secondary schools and colleges. Literature fund for aid of secondary education administered by regents.	Quarantine station in New York harbor.
1800-1850	Secretary of state, comptroller, and treasurer made board of canvassers to canvass election returns, 1801. Assumption by state of arrears of taxes on non-resident lands and sale of forfeited lands, 1801. Lieutenant governor, secretary of state, comptroller, treasurer, attorney general and surveyor general constituted commissioners of canal fund in charge of canal finances, 1817. Abolition of council of appointment and provision for appointment of secretary of state, comptroller and attorney general by legislature, 1821. Governor given veto power, 1821. Secretary of state ex officio superintendent of common schools, 1822-1854. Comptroller ex officio superintendent of banking, 1843-1851. Secretary of state, comptroller, treasurer and attorney general made elective, 1840.	Creation of canal fund and board of canal commissioners, 1817. Construction of Erie Canal, 1817-1825. Construction of Champlain Canal, 1817-1823. Construction of secondary canal system of about 450 miles, 1825-1840. Enlargement of Erie Canal to handle boats of 200 tons capacity, 1838-1862. Operation of canals by board of three elective canal commissioners, 1846-1876. Reorganization of canal debt and citation of sinking funds, 1846.	Corrections: Establishment of following prisons: Auburn, 1816; Sing Sing, 1825; and Clinton, 1844. Inauguration of state support of New York House of Refuge for Boys, 1824. Establishment of reform school at Industry, 1846. Creation of board of prison inspectors to supervise prisons, 1846. Abolished, 1877. Care of insane: Establishment of state asylum at Utica, 1836. Charities: State grants to New York City for care of foreign born poor.	Establishment of common school fund for aid of public primary schools, 1806. Establishment of district school system, 1812. Creation of state superintendent of common schools to supervise public schools, 1812. Office merged with that of secretary of state from 1831 to 1854. Authorization of state superintendent to hear appeals from decisions of local school officials (1822)—the chief function of superintendent for next seventy-five years. Establishment of state library, 1818. Founding of N. Y. Institution for Deaf and Dumb, 1817, and Institution for Blind, 1831. Granted state subsidies. Establishment of United States deposit fund for aid of education, 1837. Capital \$4,000,000. Establishment of Albany State Normal School, 1844.	Banking: Creation of safety fund banking system with fund administered by state to guarantee banknotes and other obligations, 1859. Discontinued, 1866. Establishment of bank commissioners to examine safety fund banks, 1829. Abolished and powers transferred to comptroller, 1848. Creation of free banking system, 1838. Banknote circulation controlled by comptroller. Agriculture: Creation of board of agriculture and provision for annual grants to county agricultural societies, 1819. Lapsed in 1826 and revived in 1841. State Agricultural Society subsidized as chief agency for promotion of agriculture after 1841.
1850-1880	Enactment of general incorporation laws, providing for incorporation through secretary of state, 1850 and after. Comptroller in charge of insurance supervision, 1850-1859. Comptroller authorized to supervise prison finances and pass on monthly estimates, 1859. Creation of state tax assessors and board of equalization to inspect and equalize assessments, 1859. Tax assessors abolished, 1896.	Creation of superintendent of public works in charge of canal maintenance and operation, 1876. Decline of canal traffic and earnings due to railroad competition after 1873. Abandonment of secondary canals, 1877 and 1878.	Corrections: Comptroller authorized to supervise prison finances and approve monthly estimates, 1855. Establishment of state asylum for insane convicts, 1858. Establishment of Elmira Reformatory, 1869. Creation of state superintendent of prisons, 1877. Care of insane: Authorization of transfer of chronic insane from county almshouses to state asylums to be supported at county expense, 1856. Establishment of following hospitals: Willard, 1865; Hudson River, 1868; Buffalo, 1870; Middletown, 1870; Binghamton, 1879. Creation of commissioner in lunacy to inspect state hospitals, 1878. Abolished, 1889. Care of feeble-minded: Establishment of Syracuse School for Idiots, 1851, and Newark Custodial Asylum for Women, 1878. Charities: Creation of state board of charities to inspect institutions receiving public money, 1867. Soldiers' Home at Bath, taken over in 1878.	Establishment of state school tax and free school fund for aid of common schools, 1851. Annual apportionment, \$300,000. Creation of department of public instruction to inspect and supervise public schools, 1854. Creation of assembly district school commissioners to supervise local schools, 1856. Paid by state. Beginning of union free high school system, 1856. Establishment of seven state normal schools, 1863-1867. Establishment of Cornell University as land grant college of New York, 1865. Establishment of state school for blind, 1865. Abolition of tuition charges in common schools and increase of state aid, 1867. Uniform regents' examinations for pupils entering academies, 1865. Regents' examinations for pupils completing academic course, 1877. Thomas School for Indians taken over, 1876.	Banking: Creation of banking department, 1851. State banknote circulation taxed out of existence and most state banks transferred to national banking system, 1863-1865. Requirement of biennial examinations of savings banks, 1871, and annual examinations of trust companies, 1874. Insurance: Beginning of insurance supervision, 1850. Examination of insurance companies authorized, 1853. Creation of insurance department, 1859. Beginning of systematic supervision. Public utilities: Beginning of railroad reporting, 1850. Conservation: Creation of commissioners of fisheries to protect and propagate fish, 1868.
1880-1900	Establishment of corporation tax, administered by comptroller, 1880. Administration of canal finances transferred to comptroller, 1883. Comptroller empowered to supervise administration of inheritance tax, 1892. Establishment of state excise commissioner and direct state administration of liquor tax, 1896. Creation of tax commission to supervise and equalize assessments, 1896. Comptroller given supervision of finances of institutions and power to pass on monthly estimates, 1895. Transferred to fiscal supervisor, 1902. Creation of civil service commission, 1883.	Canals: Abolition of canal tolls, 1882. Authorization of \$9,000,000 enlargement of Erie Canal, 1895. Highways: Establishment of state highway aid to towns adopting "money system" of road maintenance, 1898. Beginning of joint state and county highway construction, 1898. Buildings: Creation of state architect, 1899.	Corrections: Establishment of Hudson (1881), Albion (1890), and Bedford Hills (1892) reformatories for women, and Napanoch Reformatory for Men (1892). Abolition of old system of contracting out prison manufactures, 1889. Establishment of Matteawan and Dannemora hospitals for criminal insane, 1888 and 1896. Care of insane: Creation of commission in lunacy to inspect hospitals, 1889. Establishment of complete state care of insane solely at state expense, 1890. Establishment of St. Lawrence and Gowanda hospitals, 1887 and 1894. Transfer of following county hospitals to state: Rochester, 1891; Brooklyn and Kings Park, 1896; Manhattan and Central Islip, 1896. Commission in lunacy authorized to supervise hospital finances and pass on monthly estimates, 1893. Care of feeble-minded and epileptic: Establishment of Craig Colony for epileptics, 1894. Establishment of Rome Custodial Asylum for feeble-minded men, 1895. Charities: Women's Relief Corps home for soldiers taken over, 1894. Comptroller authorized to supervise finances and pass on monthly estimates of state institutions, 1895. Power transferred to fiscal supervisor, 1902. Board of charities given supervision of placing out children, 1898.	Establishment of regents' examinations for entrance of professions: law, 1882; medicine, 1889; dentistry, 1893; veterinary medicine, 1895; and accountancy, 1896. Establishment of three new state normals, 1885-1890. Uniform state teachers' examinations for all entrants, 1888. Creation of corps of state school inspectors, 1894. Establishment of state veterinary college at Cornell, 1894.	Banking: Requirement of annual examinations of banks, trust companies, safety deposit companies and building and loan associations, 1892. Requirement of approval of superintendent of banking for authorization of new banks, etc., 1892. Public Utilities: Requirement of state approval of increases in railroad capitalization, 1890. Creation of railroad commission with power to examine railroad affairs and recommend changes, 1892. Requirement of approval of railroad commission for construction of new lines and extensions, 1892. Labor: Creation of bureau of labor statistics, 1883. Establishment of factory inspection, 1886, and regulation of working conditions, 1887. Creation of board of arbitration and mediation, 1886. Provision for inspection of mines, 1890; sweat-shops, 1892; and bakeries, 1895. Health: Creation of state board of health to collect vital statistics, abate nuisances, enforce pure food law, and investigate disease, 1880. Establishment of cancer laboratory, 1898. Agriculture: Creation of agricultural experiment station, 1880. Establishment of dairy commissioner to enforce and to legislate law, 1894. Union of experiment station and dairy commissioner to form department of agriculture, 1893. Beginning of eradication of bovine tuberculosis, 1892. Cattle inspection and quarantine, 1893. Eradication of plant and nursery diseases, 1893. Conservation: Creation of corps of fish and game protectors, 1880. Establishment of forest preserve and forest commission, 1885. Establishment of Niagara Reservation, 1883; Adirondack Park, 1892; and St. Lawrence Reservation, 1897.
1900-1925	Establishment of supervision of municipal accounts through comptroller's office, 1905. Establishment of stock transfer tax, administered by comptroller, 1905. Creation of motor vehicle bureau to administer motor vehicle tax, 1910. Creation of efficiency and economy commission with power to prepare budget, 1913. Board of estimate and control created, 1921. Tax administration centralized in tax commission, 1921. Creation of department of purchase, 1922. Creation of state police, 1917.	Canals: Construction of Barge Canal, 1908-1920, at cost of \$150,000,000. Construction of canal terminals costing \$26,000,000, 1912-1925. Highways: Authorization of \$50,000,000 bond issue for highway improvement, 1905. Introduction of state maintenance, 1906. Adoption of state and county highway systems totalling 11,400 miles, 1907 and 1908. Creation of highway commission, 1908. Enlargement of state aid to towns, 1908. Second \$50,000,000 bond issue, 1912. Establishment of state aid to counties for road construction, 1920. Establishment of department of public works uniting canals, highways, and care of public buildings, 1923.	Corrections: Creation of commission of prisons to inspect prisons, 1907. Establishment of Great Meadows Prison, 1909. Partial reconstruction of Sing Sing and conversion of Hudson Reformatory for Women into reform school for girls, 1904. Conversion of Napanoch Reformatory into institution for feeble-minded convicts, 1921. Care of insane: Establishment of Mohawk Hospital, 1910, and Harlem Valley Hospital, 1924. Care of feeble-minded: Establishment of Letchworth Village, 1907. Creation of commission for mental deficiency to supervise institutions for feeble-minded, 1919. Charities: Fiscal supervisor created in 1902 to direct finances and purchasing of institutions other than prisons and hospitals for insane. Replaced in 1922 by superintendent of purchases. Superintendent of purchases given control of purchasing for all institutions, 1922.	Union of board of regents and department of public instruction to form department of education, 1904. Establishment of state school of ceramics, 1900. Establishment of state college of agriculture at Cornell, 1904. Establishment of six state agricultural schools, 1906-1913. Establishment of state college of forestry at Syracuse, 1911. Creation of state teachers' retirement system, 1911. Increase of volume of school aid by about \$30,000,000 per year, 1919 and 1920. Assumption by state of cost of educating indigent deaf, dumb and blind children in institutions, 1923. Further increase in volume of school aid by about \$10,000,000 per year, 1925.	Banking: Authorization of superintendent of banking to liquidate affairs of insolvent banks, 1908. Insurance: Authorization of superintendent of insurance to liquidate affairs of insolvent insurance companies, 1909. Public Utilities: Regulation of gas and electric companies by gas and electric commission, 1905-1907. Creation of public service commissions with power to regulate rates and services, and to approve increased capitalization and new utility enterprises, 1907. Applied to railroads, street railroads, gas and electric companies. Extension of regulation to telephone and telegraph companies, 1910, and steam plants, 1913. Consolidation of public service commissions and creation of transit commission to supervise transit in New York City, 1921. Labor: Creation of department of labor, 1901. State inspection of mercantile establishments, 1908. Creation of bureau of industries and immigration to safeguard immigrants, 1910. First workmen's compensation act, 1910. Invalid. Establishment of workmen's compensation, 1913. Reorganization of labor department and creation of industrial board, 1913. Health: Establishment of orthopedic hospital for children and tuberculosis hospital, 1900. Reorganization of health department and creation of public health council, 1913. Development of public health education, anti-tuberculosis campaign, and child welfare work. Narcotic drug control, 1913-1921. Transfer of quarantine station to federal government, 1921. Agriculture: State fair taken over 1900. Regulation of cold storages, 1911. Licensing of milk and commission dealers, 1913. Creation of department of foods and markets, 1914. Combined with department of agriculture in 1917 to form department of farms and markets. Conservation: Beginning of reforestation, 1901. Creation of state forest rangers, 1909. Establishment of Catskill Park, 1904; Saratoga Springs Reservation, 1909; Palisades Interstate Park, 1910; and Allegheny Park, 1921. Survey of water power resources begun in 1911. Creation of water power commission, 1921.

CH.
XXI

—
Pri
groc
adm
tive
ties



Courtesy of Professor Frank M. Stewart, University of Texas.

and marketing crops, the breeding of improved grades of stock, and the general encouragement of rural industry and the enrichment of country life; (10) the conservation and development of forest, mineral, water-power, and other natural resources, and (11) the construction, operation, and maintenance of public works, including state buildings, highways, canals, and parks.

The greatest diversity prevails among the several states with respect to the governmental agencies charged with carrying on the varied activities just enumerated; and no state appears to have followed a wholly consistent course throughout. In some instances certain of these functions have been assigned to one or another of the principal executive officers considered in the preceding chapter. At other times, an entirely new official has been set up, for example, a highway commissioner, or a superintendent of banking, or a director of conservation. But more frequently these administrative services, the newer ones in particular, have been entrusted to boards or commissions. Where a board is employed, it usually consists of persons who serve in merely an advisory capacity, leaving to subordinates the actual administrative work. In numerous instances these boards are composed, in part at least, of *ex-officio* members—the governor, comptroller, attorney-general, etc.—who give only a small part of their time and attention to the tasks assigned to the board. Examples are to be found in boards of health, boards of education, boards of agriculture, and pardon boards. Commissions may be distinguished from boards by the fact that they are usually composed of officials who are expected to perform the actual work of administration, and give all their time to that work. When, also, an administrative agency is clothed with quasi-legislative or quasi-judicial powers, it is generally called a commission rather than a board. But this distinction does not always hold true, even in the same state, for the two terms are often used interchangeably. The most important examples of commissions, as distinguished from boards, are railway or public utility commissions, tax commissions, and civil service commissions. The extent of the power wielded by these different officers, boards, and commissions varies widely, of course, from state to state. At one extreme they are found merely exercising the power to investigate and recommend; at the other extreme, they may be found issuing orders and regulations which have the force of law and are enforceable in the courts, notably in the case of boards of health and

public utility commissions.¹ But on the side of internal organization—that is, in determining the number of persons on their staff, the grade or rank of each, and the amount of their compensation—they have been granted comparatively slight power; such matters are usually regulated by the legislature as a part of its general control over practically the entire administrative system.

The rising tide of expenditures in the past few years entailed by these multiform administrative activities has prompted searching investigations and illuminating reports by commissions on economy and efficiency in about a third of the states.² The main purpose of these inquiries has been to ascertain which, if any, of the numerous administrative agencies were unnecessary; which, if any, might profitably be combined; and in what other ways a greater degree of economy and efficiency might be introduced into the administrative branches of the state government. In almost every instance, the report of such a commission has amounted to a severe indictment of the existing state administration as unscientific, uneconomical, and inefficient. The most important specific defects brought to public attention in this way may be summarized as follows.

Defects
in state
adminis-
tration

There is the utmost lack of uniformity in the methods by which the members of these various administrative agencies are selected, in the length of their terms, in the ways provided for their removal from office, and in the standards of compensation. In New York, for example, just prior to the reorganization of 1927, seven of the 187 principal state administrative positions were filled by popular election, seven by the legislature, fifteen by appointment by the governor; while fourteen were *ex-officio* bodies, seventeen were partly *ex-officio* and partly appointed by the governor, sixty-eight

1. Lack of
uniformity
in organi-
zation:

(a) elec-
tive or
appointive
positions

¹ Cf. W. H. Pillsbury, "Administrative Tribunals," *Harvard Law Rev.*, XXXVI, 405-425, 583-592 (Feb.-Mar., 1923).

² The best examples of such reports are those of the Illinois Committee on Efficiency and Economy (Springfield, 1915), the Massachusetts Commission on Economy and Efficiency (Boston, 1914), the New York Reconstruction Committee (Albany, 1919), the Michigan Community Council Commission (Detroit, 1921), and the Kentucky Efficiency Commission (1923-1924). Other discussions along the same lines are J. L. Donaldson, "State Administration in Maryland," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XXXIV (1916); Griffenhagen and associates, *A Plan for the Administrative Consolidation of Maryland* (Baltimore, 1921); *Municipal Research*, No. 61 (1915), and No. 90 (1917); F. M. Stewart, "Officers, Boards, and Commissions," *Univ. of Texas Bulletin*, No. 1854 (1918); "The Reorganization of State Administration in Texas," *ibid.*, No. 2507 (1925). See also *Amer. Polit. Sci. Rev.*, VIII, 431-436 (Aug., 1914); IX, 252, 304, 317-322 (May, 1915); X, 557-563 (Aug., 1916); and XII, 510-514 (Aug., 1918).

CHAP.
XXXIX

(b) bi-
partisan
boards

were appointed by the governor and senate, and the remainder were constituted in a bewildering variety of ways.¹

Many state boards and commissions are called non-partisan when in reality they are bi-partisan, consisting of persons belonging to the two major political parties. Representation of the principal minority party upon these boards or commissions was originally intended to serve as a check upon the majority party and to mitigate the evils of partisanship in administration. In actual practice, however, this arrangement often results in bi-partisan agreements concerning the distribution of patronage attached to the office, in a division of responsibility for the character of the work performed, and in warding off threatened investigations which might prove equally damaging to the two parties represented on the board. Ordinarily much better results might be expected if all members of such boards belonged to the same party, thereby concentrating the responsibility for good or bad administration and putting the dominant party on its mettle. Such an arrangement, however, does not appeal to the ordinary politician, who appears to have an instinctive dread of being placed in a position where he must shoulder all the blame for whatever may go wrong in public administration.

(c) term

The term of some of the administrative officers is definitely fixed by law and coincides with that of the governor; in the case of others, there is a fixed term which does not coincide with that of the governor; while in still other instances the term is left more or less indefinite.

(d) re-
movals

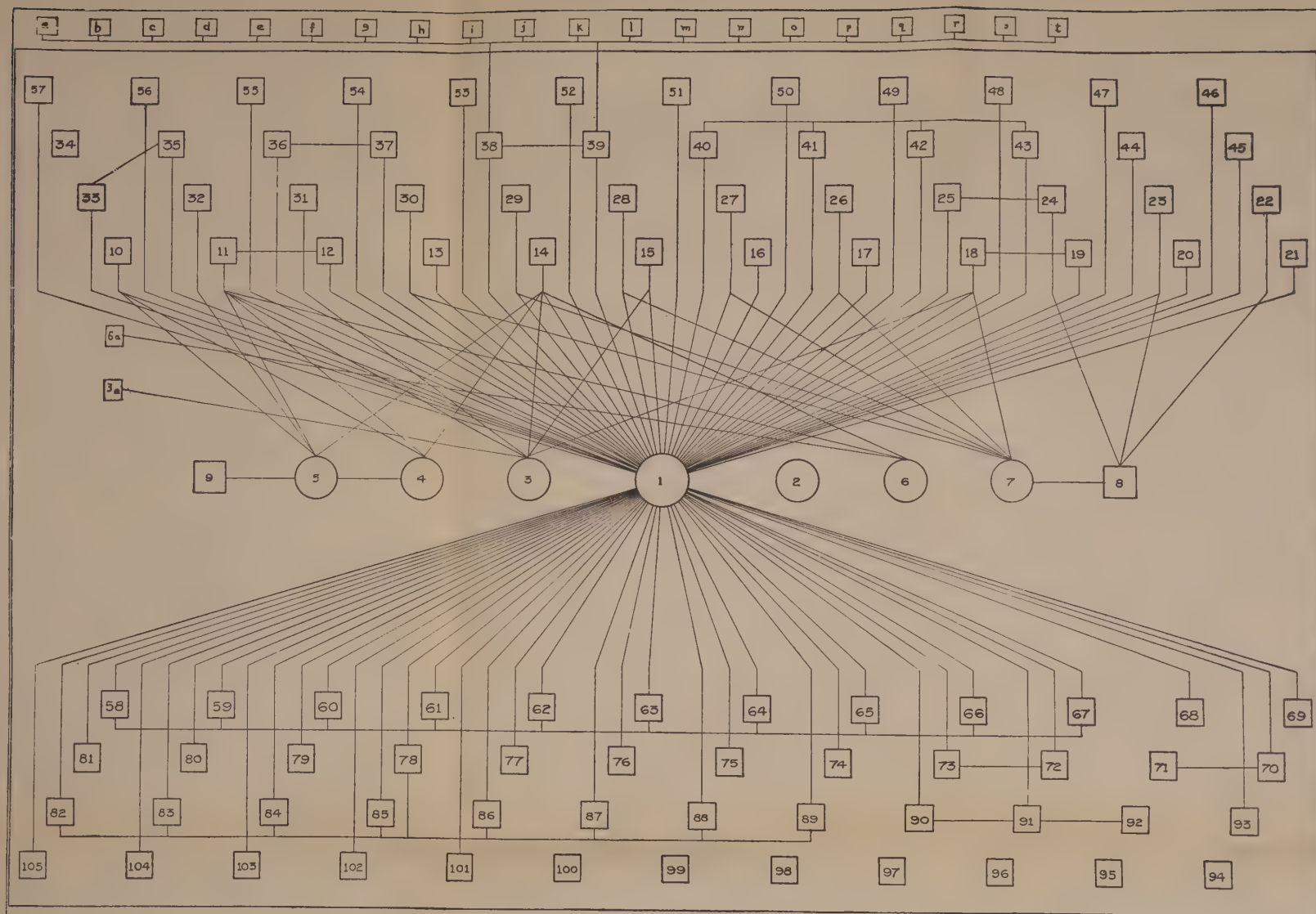
There is likewise no uniformity in the methods provided for the removal of administrative officials. Impeachment by the lower branch of the legislature, followed by trial and conviction before the senate, is authorized in most states for the most important state officers; but this is a cumbersome method, seldom made use of. In New York there are, besides the process of impeachment, no fewer than seven distinct ways of removing department heads and other principal officials; less than one-half can be removed by the governor upon his individual responsibility. In other states the situation is not essentially different.²

(e) com-
pensation

Some of the administrative officers of the state are paid a fixed salary; others receive no salary, but are paid by the day or by

¹ See charts accompanying the *Report of the Committee on Reconstruction* (1919).

² A. N. Holcombe, *State Government in the United States* (2nd ed., 1926), 298.



STATE EXECUTIVE ORGANIZATION IN ILLINOIS IN 1915

Courtesy of Professor John A. Fairlie

INDEX

- | | | | |
|--|---|---|---|
| 1 Governor | 21 Trustees State Historical Library | 42 Managers Illinois State Reformatory | 74 Board of Pharmacy |
| 2 Lieutenant-Governor | 22 State Water Survey | 43 Board of Prison Industries | 75 Board of Dental Examiners |
| 3 Secretary of State | 23 State Geological Commission | 44 New Penitentiary Commission | 76 Board of Nurse Examiners |
| 3a Automobile Department | 24 Natural History Survey | 45 State Board of Pardons | 77 Board of Barbers Examiners |
| 4 State Treasurer | 25 State Entomologist | 46 State Highway Commission | 78 State Mining Board |
| 5 Auditor of Public Accounts | 26 State Board of Education | 47 Canal Commissioners | 79 Miners Examining Board |
| 6 Attorney-General | 27 Trustees Southern Illinois Normal University | 48 Rivers and Lakes Commission | 80 Mine Rescue Station Commission |
| 6a Inheritance-Tax Office | 28 Trustees Northern Normal School | 49 Game and Fish Conservation Commission | 81 Mining Investigation Commission |
| 7 Superintendent of Public Instruction | 29 Trustees Eastern Normal School | 50 Illinois Park Commission | 82-89 Mine Inspectors |
| 8 Trustees University of Illinois | 30 Trustees Western Normal School | 51 State Architect | 90 State Veterinarian |
| 9 State Board of Equalization | 31 Corporation Department | 52 State Art Commission | 91 Live-Stock Commission |
| 10 State Tax Levy Board | 32 Banking Department | 53-56 Monument Commissions | 92 Board of Veterinary Examiners |
| 11 State Board of Contracts | 33 Insurance Department | 57 Board of Architects Examiners | 93 Stallion Registration Board |
| 12 Printer Expert | 34 State Firemen's Association | 58 Commissioners of Labor | 94 State Board of Agriculture |
| 13 Court of Claims | 35 State Fire Marshal | 59 Chief Inspector of Private Employment Agencies | 95 Illinois Farmers' Institute |
| 14 State Canvassing Board | 36 Public Utilities Commission | 60-67 Superintendents of Free Employment Agencies | 96 Illinois Horticultural Society |
| 15 Voting-Machine Commission | 37 Grain Inspection Department | 68 Factory Inspector | 97 Illinois State Poultry Association |
| 16 Civil Service Commission | 38 Charities Commission | 69 Industrial Board | 98 Illinois State Dairyman's Association |
| 17 Adjutant-General | 39 Board of Administration | 70 State Board of Health | 99 Illinois State Live-Stock Breeders Association |
| 18 State Library Commission | 40 Commissioners Illinois State Penitentiary | 71 Lodging-House Inspectors | 100 Illinois State Bee-Keepers Association |
| 19 Library Extension Commission | 41 Commissioners Illinois Southern Penitentiary | 72 State Food Inspector | 101 Inspector of Apiaries |
| 20 Legislative Reference Bureau | | 73 Food Standard Commission | 102-105 Humane Agents |

(Courtesy of Professor John A. Fairlie.)

CHAP.
XXXIX

(b) bi-
partisan
boards

(c) ter

(d) re-
movals

(e) con
pensati

fees; while still others are allowed only their actual expenses while performing their official duties.

CHAP.
XXXIX

Subordinate positions attached to the various administrative departments and public institutions, aggregating more than ten thousand in several states and about twenty-two thousand in New York, are generally distributed among the political and personal friends of the officers or members of the several boards and commissions in accordance with the well-known principles of the spoils system; and this fact goes far toward explaining the inefficiency with which many state functions are performed when judged by the standards prevailing in private business enterprises.

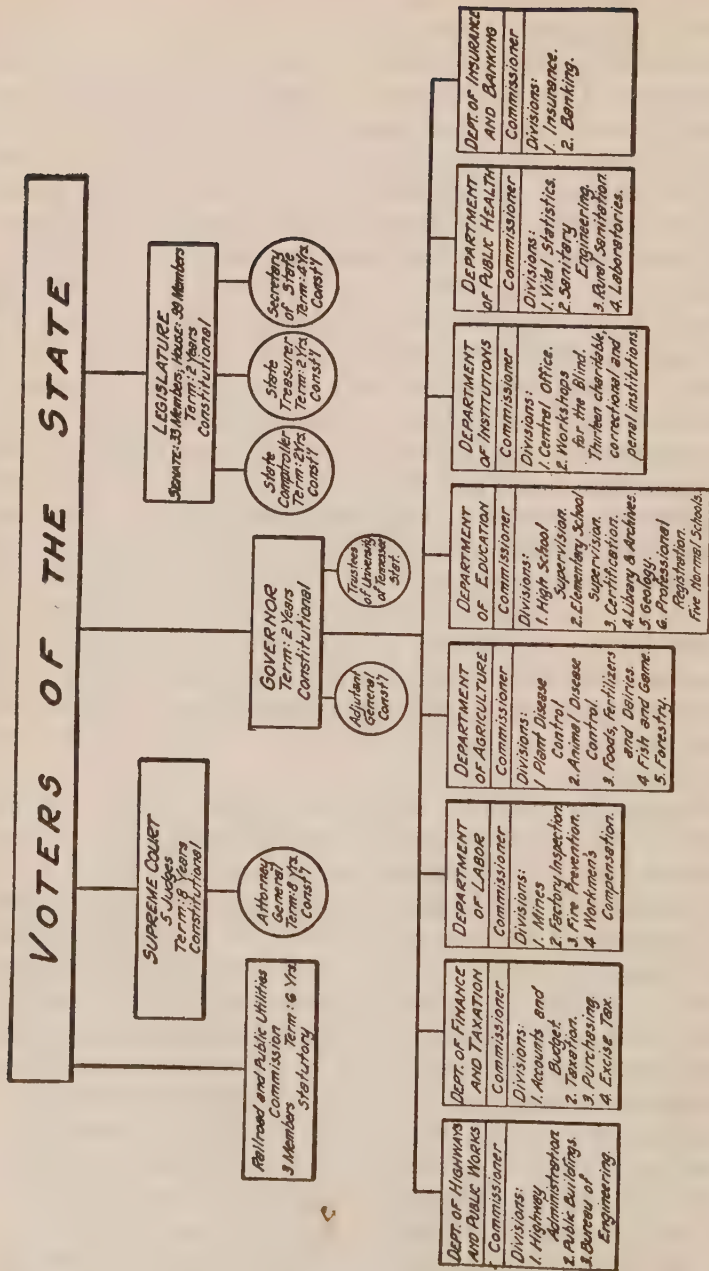
(f) spoils
system

Not only are the administrative agencies of practically all of the states seriously defective on their structural side, but numerous faults appear in the division of functions among them, and in their relations with one another. In general, there has been little effort to correlate them; and, instead of finding similar or clearly related functions combined in a single administrative office, the commissions on economy and efficiency have almost uniformly reported a most unfortunate division of related duties and activities among two or more boards, commissions, or officers, who often do their work quite independently of each other and of any central directing and controlling officer. Harmonious coöperation—in other words, teamwork—is rare and more or less accidental; offices and activities are needlessly duplicated, resulting in both inefficiency and added expense.

2. Im-
proper
functional
division
and inade-
quate cor-
relation

In Illinois, for example, before the adoption of the reforms embodied in the civil administrative code of 1917, there were separate boards for each penitentiary and reformatory, half a dozen boards dealing with agricultural interests, almost a score of more or less independent state agencies having to do with labor and mining, a series of distinct departments dealing with corporations of one kind or another, a number of boards working in the interest of public health, and numerous uncorrelated educational agencies; even a single finance department could hardly be said to exist when duties relating to state finance were divided among the governor, the treasurer, the auditor, the attorney-general, the secretary of state, the insurance commissioner, and other officers. State laws required the reporting of industrial accidents to one or more of at least five separate state offices, and "no employer was sure whether he must report to one, two, three, or more bodies; or could be certain as to when he had complied with the law on this

TENNESSEE **ORGANIZATION OF STATE GOVERNMENT** **UNDER THE REORGANIZATION ACT OF 1923**



A HIGHLY CENTRALIZED STATE ADMINISTRATIVE SYSTEM.

(Reproduced from A. E. Buck's *Administrative Consolidation in State Governments*, by courtesy of the National Municipal League.)

subject. . . . The natural result was that in most cases the employer simply disregarded all of the laws with respect to accident reporting; and the confused relationships among the several state authorities prevented any of them from detecting his violation of the law."¹ Overlapping functions, and sometimes needlessly duplicated offices, were also conspicuous in the inspectorial work carried on by some of the state departments: inspectors from the health department, from the food commission, and from the department of factory inspection might visit the same places at different times for much the same purpose and give conflicting orders, when one visit by a single set of inspectors would have been sufficient.²

Over the scores of administrative agents, boards, and commissions there is, as a rule, no unifying or coördinating authority and only very slight directing or supervisory control. A proper degree of responsibility to the governor, to the legislature, or to the people is almost everywhere lacking. Elective officers are practically independent of one another, and of the chief executive of the state as well; and the control of the governor over the appointive agencies is usually slight. With no single officer responsible for the proper functioning of the organs of state administration, it is not surprising to find the different administrative agencies looking after their legislative needs quite independently and sometimes urging the enactment of measures which are in direct conflict. The public is accustomed to hold the governor responsible for the success or the shortcomings of the state administration, when in reality he can exercise little or no effective control over so large a number of administrative agencies, selected in such diverse ways, serving for such varying terms, and rarely removable by his independent action. Under the circumstances

CHAP.
XXXIX

3. Inadequate unifying and directing authority

¹ W. F. Dodd, *State Government*, 243.

² J. M. Mathews, *Principles of American State Administration*, 169-170. In New York, in 1919, there were five departments and numerous independent boards having authority over the custody of state parks, reserves, and places of interest; more than seven departments assessing and collecting taxes; more than ten departments, boards, and commissions for state correctional and charitable institutions. Legal functions were scattered through ten departments besides that of the attorney-general; and there were numerous uncorrelated educational agencies. *Committee on Reconstruction Report* (1919), 7. Before recent changes in Michigan, "responsibility and authority for dealing with state financial problems had been distributed among every elected state official and board except the lieutenant-governor. Thirty authorities divided responsibility with the governor in administering state welfare work. Problems relating to trade and commerce were divided among thirteen authorities. Education and related questions were dealt with by five elected officials and twenty-seven other authorities. . . ." L. D. Upson, "Unscrambling Michigan's Government," *Nat. Mun. Rev.*, X, 361-362 (July, 1921).

CHAP.
XXXIXUnity
imparted
only by the
"machine"

that exist "it is manifest that the governor does not govern, that he cannot govern, however serious his intentions to do so may be. Indeed, the whole administrative system on its legal and official side seems definitely calculated to prevent his governing." Whatever unifying and harmonizing force there is comes, in many states, from the outside, being exerted by the "invisible government" of political organizations.¹

4. Costli-
ness of
state
admin-
istration:

The uneconomical character of state administration is partly traceable to the unscientific way in which it is organized, as indicated in the preceding pages. Other causes are to be found in the general absence of a modern or uniform system of accounting for the different executive departments and administrative boards and commissions; and especially in the absence, until very recently, of any arrangement for centralized purchasing of supplies and materials used by the various state offices and institutions. As in county and city administration, it has been the almost uniform practice to allow each state department or institution to purchase its own materials and supplies, subject to certain statutory regulations. For this disjointed and needlessly expensive system, centralized purchasing substitutes a purchasing bureau or agent to attend to these matters for the different administrative units. There are, of course, limits to the economies which can reasonably be expected from centralized purchasing, but there is no doubt that a great saving might be effected by its wider adoption, as the experience of the twenty-odd states where the system has been tried abundantly proves.²

(a) lack
of proper
accounting
and
purchasing
methods(b) lack
of a
responsible
budget-
making
authority

The high and increasing cost of state administration is also traceable to the lack of a central agency or authority whose duty it is to study the financial needs of the various administrative departments and state institutions, to collect and revise the estimates

¹ E. Dawson, "The Invisible Government and Administrative Efficiency," *Annals of Amer. Acad. Polit. and Soc. Sci.*, LXIV, 11-30 (March, 1916). See also in this connection Elihu Root's address to the New York constitutional convention of 1915, entitled "Invisible Government," *Rev. of Revs.*, LII, 465-467 (Oct., 1915).

² On the subject of centralized purchasing, see A. G. Thomas, *Principles of Governmental Purchasing* (New York, 1919); A. E. Buck, "The Coming of Centralized Purchasing in State Governments," *Nat. Mun. Rev.*, Supplement, IX, 117 ff. (Feb., 1920); J. M. Coyle, "Operation of Centralized Purchasing in New Jersey," *Annals of Amer. Acad. of Polit. and Soc. Sci.*, CXIII, 291-297 (May, 1924); W. G. Scott, "Results of the Pennsylvania Plan for Standardizing and Purchasing Supplies," *ibid.*, 298-305 (May, 1924); M. Conover, "Centralized Purchasing Agencies in State and Local Governments," *Amer. Polit. Sci. Rev.*, XIX, 73-82 (Feb., 1925); R. Forbes, "Virginia Centralizes Purchasing," *Nat. Mun. Rev.*, XIII, 456-457 (Aug., 1924).

submitted by them, and to prepare and submit for legislative consideration a comprehensive and itemized schedule of appropriations needed to ensure the maintenance of the administrative services of the state institutions without waste or extravagance. In the lack of a carefully prepared budget covering all phases of state administration, the independent and uncorrelated officers, boards, and commissions are found vigorously competing with one another before the legislature, each striving to obtain the most generous appropriations possible, without reference to the needs of the others, and without much reference to the probable revenues of the state. Furthermore, there has been, with few exceptions, no effective centralized control over the expenditure of appropriations thus obtained; whence has arisen still further waste and extravagance.

CHAP.
XXXIX

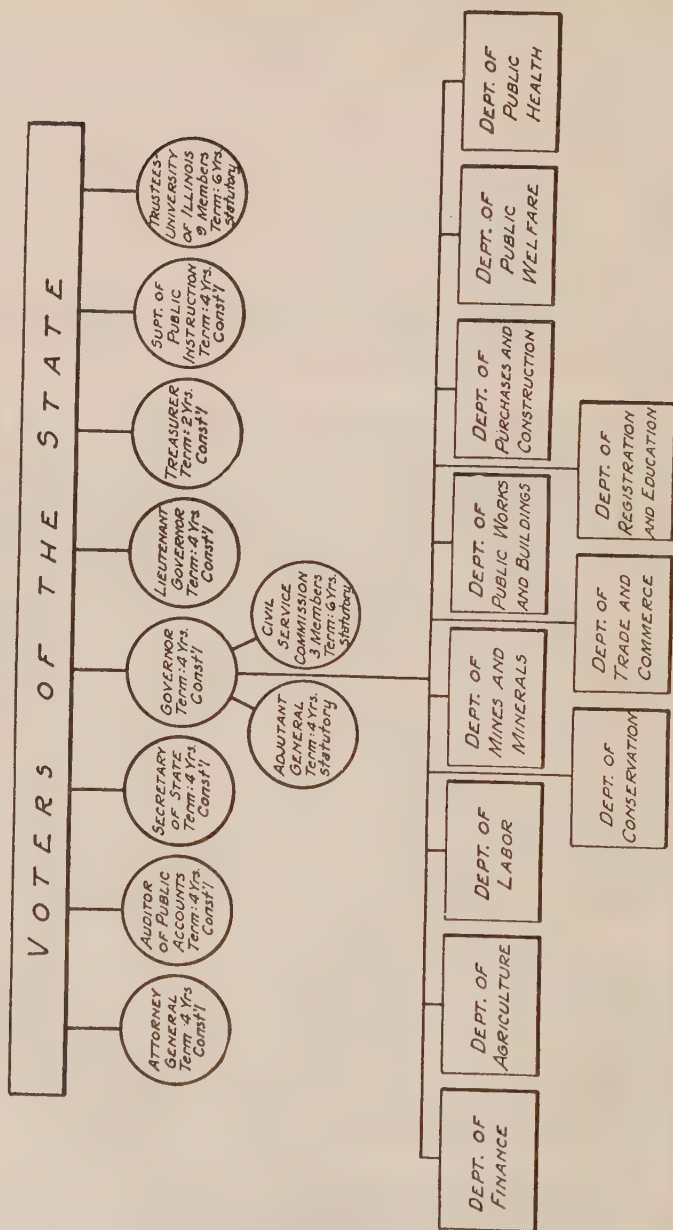
Besides bringing to light these fundamental defects of state administration, the reports of economy and efficiency commissions have usually embodied certain definite suggestions and recommendations for a reorganization of the state administrative services; and these proposals have formed a starting point for the movement for administrative consolidation which has appeared in about three-fourths of the states since 1916.¹ By administrative consolidation is meant chiefly, (1) reorganization of the numerous administrative offices into a few coördinated departments with heads; (2) authorization of the governor to appoint these department heads, who become directly responsible to him and serve as his cabinet; and (3) careful adjustment of the terms of department heads with reference to the term of the governor. The object is, manifestly, to concentrate in the governor a real, not merely a nominal, responsibility for the state administration—such as the president bears in relation to national administration—and to introduce a long-needed degree of unity, efficiency, and economy. Such administrative reorganization naturally demands (1) a careful grouping of related functions under the same departmental management, based upon a careful survey of all the administrative activities of the state; (2) a proper internal organization of each department, *i.e.*, the subdivision of each department into divisions or bureaus, each with its chief responsible to the head

Movement
for reform
of state
adminis-
tration

Essentials
of effective
reorganiza-
tion

¹Excellent summaries of this movement are to be found in the *New York Committee on Reconstruction Report* (1919), 233 ff.; A. E. Buck, "Administrative Consolidation in State Government," *Nat. Mun. Rev.*, Supplement, VIII, 639 ff. (Nov., 1919); *Administrative Consolidation in State Governments* (Pamphlet, 4th ed., New York, 1928).

ILLINOIS
ORGANIZATION OF STATE ADMINISTRATION UNDER THE CIVIL ADMINISTRATIVE CODE OF 1917,
AS AMENDED IN 1919 AND 1925



(Reproduced from A. E. Buck's *Administrative Consolidation in State Governments*, by courtesy of the National Municipal League.)

of the department, and a logical division of departmental work among the several subdivisions; and (3) the abolition of unnecessary offices and the consolidation of duplicated activities. Administrative consolidation does not necessarily include reform in accounting, purchasing, and budgetary methods, but it is a prerequisite for the successful introduction of these reforms, and in the plans of administrative consolidation adopted in Illinois, Idaho, Nebraska and New York these reforms have been practically coincident.¹

After some unsuccessful efforts to bring about administrative reorganization in Oregon in 1909 and 1911, in Minnesota in 1913, and in Iowa and New York in 1915, the first comprehensive plan was adopted by the Illinois legislature of 1917, following a careful preliminary survey of all the state's administrative agencies. The civil administrative code, which embodies the reform, abolished over one hundred statutory offices, boards, and commissions and consolidated their functions in nine departments, namely, finance, agriculture, labor, mines and minerals, public works, public welfare, public health, trade and commerce, and registration and education.² At the head of each of these departments is a director appointed by the governor and senate for a term of four years coinciding with the governor's term. Under each director are an assistant director and heads of bureaus, also appointed by the governor and senate, although under the immediate control of the head of the department. Each department is authorized to appoint its own employees, subject to the civil service rules of the state. Whenever quasi-legislative or quasi-judicial duties are included in the work of a department, special boards have been provided to perform such functions.³ The members of these boards are appointed by the governor and senate, and although such boards are not subject to the direction, supervision, or control of the director of any department, they are component parts of the department to which they are attached and are under the general fiscal supervision of the director of finance. Boards

CHAP.
XXXIX

Illinois
civil
administra-
tive code

¹ See p. 799.

² In 1925 a department of conservation and a department of purchases and construction were created.

³ There is an industrial commission in the department of labor, a mining board and a miners' examining board in the department of mines and minerals, a tax commission in the department of finance, a public utilities commission in the department of trade and commerce, a normal school board in the department of registration and education, and a food standards commission in the department of agriculture.

of an advisory character are also provided for in the departments of agriculture, labor, public works, public welfare, public health, and registration and education. Their members, serving without pay, assist and advise the governor and directors in determining questions of policy. Provision is also made in this code for a centralized purchasing system for the departments, for a uniform accounting system, and for an improved executive budget system.

The work of administrative consolidation in Illinois, following the line of least resistance, was carried almost as far as the legislature could go without amendments to the constitution. Nevertheless, certain important executive officers and administrative agencies have not been affected by the new code: the duties of the seven constitutional executive officers were not changed; and more than twenty independent statutory boards, commissions, or offices remain outside of the eleven code departments, less than half of them being filled by appointment by the governor. Here, as in all other states, complete administrative consolidation, which will centralize responsibility for administration in the governor, as in the national sphere it is now centralized in the president, must await numerous constitutional amendments. The Illinois civil administrative code has, nevertheless, shown what progress can be made by ordinary legislative action toward the introduction of a scientific and efficient form of state administrative organization.¹

The example thus set has stimulated more than a score of states to give serious consideration to definite plans of reorganization and consolidation,² and at least nine additional states have begun to show signs of appreciating the importance of reconstructing their state administrative machinery.³ Thus far the most important achievements are to be noted in Idaho, Massachusetts, and Nebraska

Constitutional amendments essential to complete reorganization

Reorganization in other states

¹For further details of the Illinois civil administrative code, see J. M. Mathews, "Administrative Reorganization in Illinois," *Nat. Mun. Rev.*, Supplement, IX, 739 ff. (Nov., 1920); J. A. Fairlie, "Illinois Administrative Code," *Amer. Polit. Sci. Rev.*, XI, 310-315 (May, 1917); F. O. Lowden, "Problems of Civil Administration," *No. Amer. Rev.*, CCX, 186-192 (Aug., 1919); *ibid.*, "Reorganization in Illinois and Its Results," *Annals Amer. Acad. of Polit. and Social Sci.*, CXIII, 155-160 (May, 1924); *ibid.*, "Reorganizing the Administration of a State," *Nat. Mun. Rev.*, XV, 8-13 (Jan., 1926); A. E. Buck, "Illinois Civil Administrative System—What It Has Accomplished," *Nat. Mun. Rev.*, XI, 362-367 (Nov., 1922).

²These states, in addition to those named in the text, are Arizona, Arkansas, Colorado, Connecticut, Delaware, Iowa, Kentucky, Michigan, Missouri, Nevada, New Jersey, North Carolina, Oklahoma, Oregon, South Dakota, and Virginia.

³Alabama, Georgia, Indiana, Kansas, Louisiana, New Mexico, South Carolina, Texas, Utah, and Wisconsin.

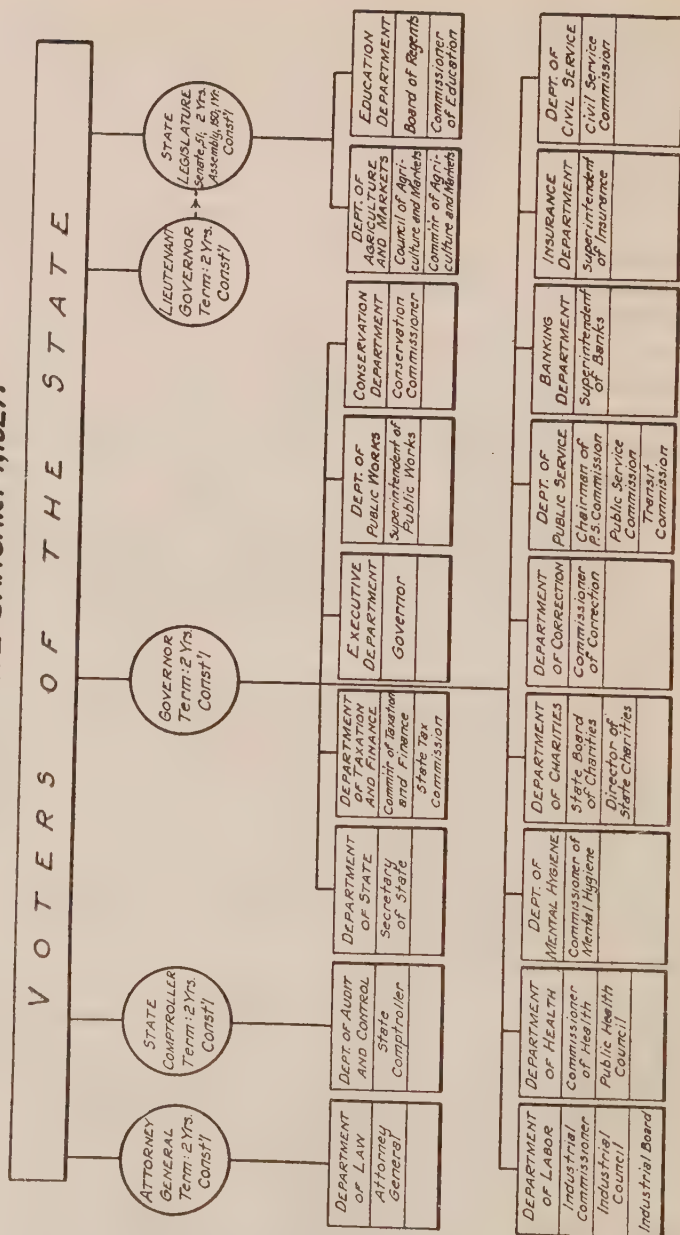
(1919), in Ohio and Washington (1921), in Maryland (1922), in Pennsylvania, Tennessee, and Vermont (1923), and in Minnesota (1925). In California, although a beginning had been made in 1921, thoroughgoing reorganization did not come about until 1927. At that time nearly sixty independent agencies were combined into nine departments, with heads appointed by the governor and serving as his cabinet. It is confidently expected that the legislature in 1929 will complete the work of reconstruction by creating two additional departments (commerce and professional standards), thus reducing the thirty-odd remaining independent agencies to fifteen.¹

In New York a constitutional amendment was adopted in 1925 providing for a complete overhauling of the state's administrative "system." Shortly thereafter, a State Reorganization Commission was created, consisting of a group of citizens selected by the governor and the leaders in the legislature. Under the chairmanship of a former governor, Charles E. Hughes, this commission, after thorough study, reported detailed recommendations for a reorganization whereby the 180-odd administrative agencies should be consolidated into eighteen departments, the heads of which, with two exceptions,² should be appointed by the gov-

¹The following articles give more facts relating to recent administrative changes, both adopted and proposed: in California, *Nat. Mun. Rev.*, X, 393 (July, 1921); *ibid.*, XVII, 220-225 (Apr., 1928); *Amer. Polit. Sci. Rev.*, XV, 576-579 (Nov., 1921); in Idaho, *Nat. Mun. Rev.*, VIII, 615-620 (Nov., 1919); in Maryland, *ibid.*, XI, 219-220 (July, 1922); *Amer. Polit. Sci. Rev.*, XVI, 640-647 (Nov., 1922); in Michigan, *ibid.*, XV, 579-581 (Nov., 1921); *Public Business*, III, 147-163 (Dec. 10, 1924); in Minnesota, *Amer. Polit. Sci. Rev.*, XX, 69-76 (Feb., 1926); in Missouri, *Amer. Polit. Sci. Rev.*, XV, 383-384 (Aug., 1921); *Washington Univ. Studies*, VIII, 151-165 (Apr., 1921); *Nat. Mun. Rev.*, XVI, 210-211, 218 (Mar.-Apr., 1927); in Nebraska, *Rev. of Revs.*, LXI, 295-302 (March, 1920); *Nat. Mun. Rev.*, XI, 192-200 (July, 1922); *Bulletin* No. 11, Nebraska Legislative Reference Bureau (1922); in New York, *Amer. Polit. Sci. Rev.*, XX, 76-79 (Feb., 1926); *ibid.*, XXI, 349-359 (May, 1927); in Ohio, *Amer. Polit. Sci. Rev.*, XV, 380-383 (Aug., 1921); *ibid.*, XVI, 399-411 (Aug., 1922); in Pennsylvania, *ibid.*, XVII, 597-608 (Nov., 1923); *Nat. Mun. Rev.*, XII, 526-528 (Sept., 1923); in Tennessee, *ibid.*, XII, 592-600 (Oct., 1923); in Texas, *Southwestern Polit. Sci. Quar.*, V, 230-245 (Dec., 1924); *Univ. of Texas Bulletin* No. 2507 (Feb., 1925); in Vermont, *Amer. Polit. Sci. Rev.*, XVIII, 96-101 (Feb., 1924); in Virginia, *Amer. Polit. Sci. Rev.*, XX, 832-836 (Nov., 1926); in Washington, *Nat. Mun. Rev.*, X, 334-336 (June, 1921). The changes in all these states are well summarized in A. E. Buck, *Administrative Consolidation in State Government* (pamphlet published by the National Municipal League, New York City, 4th ed., Jan., 1928).

²The attorney-general, at the head of the law department, and the comptroller, at the head of the department of audit and control, are elective officials. Several departments are headed by commissions of three or five members; but in each case, a departmental chairman is provided, and the other members are restricted to their quasi-judicial functions. R. S. Childs, "New York State Reorganizes," *Nat. Mun. Rev.*, XV, 265-269 (May, 1926).

NEW YORK
ORGANIZATION OF THE STATE ADMINISTRATION UNDER THE REORGANIZATION,
EFFECTIVE JANUARY 1, 1927.



Reproduced from A. E. Buck's *Administrative Consolidation in State Governments*, by courtesy of the National Municipal League.

ernor and senate.¹ The necessary legislation to carry out these recommendations was enacted in 1926, and the new scheme became effective on the first of January, 1927. As a corollary to the establishment of this new organization, the governor, solely upon his own initiative and authority, has created a cabinet comprising the heads of all but five of the new departments, which began holding regular bi-weekly meetings in February, 1927.

If, with properly constructed machinery, state administration is not more efficient and more economical than under the present system with its endless incongruities, absurdities, and lack of coordination, the fault will lie chiefly with the governor and the character of his appointees; and the public will be in a position to assign the blame intelligently, since the system will be far more understandable by the average citizen than it is today. Few people, and then only after long and painstaking study, can really comprehend the intricate network of departments, offices, boards, and commissions, which, until recently, has everywhere formed the administrative branch of state government. "Democracy," as the New York Reconstruction Commission of 1919 truly said, "does not merely mean periodical elections. It means a government held accountable to the people between elections. In order that the people may hold their government to account, they must have a government that they can understand." The movement for administrative consolidation is, therefore, one more important step toward making our state governments more genuinely democratic; the reconstruction which is contemplated, when fully carried out, will mean the clearing away of a jungle whose devious bypaths have hitherto been the haunts of the spoilsman and the grafter.

To produce the most satisfactory results, however, the structural changes described above must be accompanied by a thorough regeneration of the method of filling the thousands of subordinate positions connected with state institutions and administrative services. Personal favoritism and partisan considerations, which are almost everywhere the controlling factors, need to be eliminated and the merit system substituted. The merit system is founded on the principle that public office is a public trust, which should be

CHAP.
XXXIX

Reorgani-
zation
essential to
genuinely
democratic
state gov-
ernment

Civil
service
reform

¹ The Hughes Commission's report is printed in full in the *N. Y. Times*, March 2, 1926.

² J. McGoldrick, "Governor Smith Introduces the Cabinet in New York State," *Nat. Mun. Rev.*, XVI, 226-229 (Apr., 1927); W. A. Warn, "Governor Smith's Cabinet Begins Its New Régime," *N. Y. Times*, Feb. 13, 1927.

CHAP.
XXXIXEssential
features of
the merit
system

bestowed only upon persons of proved fitness. It assumes that the public is entitled to reasonable qualifications on the part of its servants, and that these can, in a vast majority of cases, be ascertained by a properly devised and fairly administered system of competitive examinations, open to all applicants. It also aims to prevent promotions or dismissals, for merely personal or political reasons, of public employees selected in this manner, and to establish the rule that removals shall be made only for legitimate causes, such as dishonesty, negligence, and inefficiency. The system ought, therefore, to be made to apply, not only to the appointment, but also to the promotion and removal, of practically all non-policy-determining subordinate positions connected with the state administration. The adoption of the merit system, furthermore, tends to bring about the appointment of better qualified persons for positions in the service of the state, and to secure for them and for the state the advantages that should accompany permanence of tenure; and it helps protect the governor and other appointing officers from the importunities of office-seekers, who sometimes invade official residences much as frogs covered the land of Egypt.

State civil
service
laws

The most effective device for uprooting the deeply entrenched spoils system is the enactment and honest enforcement of a carefully drawn civil service law. Unfortunately, less than a dozen states have such laws. Following the example of the national government, New York and Massachusetts adopted civil service laws in 1883 and 1884, respectively. But for more than twenty years they stood alone; everywhere else the spoils system held full sway until 1905, when Wisconsin and Illinois, and 1907, when Colorado and New Jersey, put merit laws into operation. These states were followed in 1913 by California, Connecticut,¹ and Ohio, in 1915 by Kansas,² and in 1920 by Maryland. In three states (New York, Colorado,³ and Ohio) the state constitution requires the enactment of civil service laws embodying the merit principle, but elsewhere the merit plan rests entirely upon the insecure foundation of statutes which may be repealed at any time or so amended

¹ The Connecticut law was repealed in 1921.

² Although Kansas has a civil service law, it has had no commission to administer it since 1922, owing to the failure of the legislature to make the necessary appropriations.

³ Colorado has had two constitutional amendments on civil service; the last, in 1918, is much more stringent than the earlier one. See S. H. Ordway, "The Civil Service Clause in the Constitution," *Acad. Polit. Sci. Proceedings*, V, 251-262 (1914).

as to restrict its application to comparatively few employees.¹

CHAP.
XXXIX

In their main features, state civil service laws are modelled upon the national civil service act of 1883,² and include provisions for the classification of state employees, competitive examinations for their appointment and promotion, and clauses prohibiting appointments and removals for political reasons. These laws are usually administered by bi-partisan civil service commissions consisting of three members,³ appointed by the governor and senate. However wisely and skilfully a civil service law may be drawn, the success or failure of the merit system depends very largely upon the character, ideals, and efficiency of the members of this commission. The best of such laws can be made a farce in practical operation in the hands of an indifferent or hostile commission. And this has frequently happened when the commissioners have been purely political appointees, closely identified with the spoils system which they were supposed to eliminate or check, and have merely reflected the governor's own attitude toward the merit system. Civil service administration under commissions thus constituted has in reality been the work of a crew deliberately setting out to wreck the system without violating the letter of the law. For although civil service commissioners may bar the main entrance to the government, they may allow political favoritism and partisanship in roundabout ways; for example, through their power to grant exemptions from examinations in special cases, through abuse of the right to make temporary appointments without examination in order to meet "emergencies," or by using their power

Civil service commissions

¹A convenient summary of most of the state civil service laws will be found in *Ill. Committee on Efficiency and Economy Report* (1915), 911 ff. See also J. M. Mathews, *Principles of American State Administration*, Chap. 1x; A. S. Faught, "A Review of the Civil Service Laws of the United States," *Nat. Mun. Rev.*, III, 316-326 (April, 1914), and VIII, 275-278 (June, 1919). See also H. W. Dodds, "Governor Pinchot and the Merit System," *Nat. Mun. Rev.*, XIV, 220-226 (Apr., 1925); *Transactions of the Commonwealth Club of California*, XVI, 299-346 (Dec., 1921), "Civil Service in California"; M. Conover, "Merit Systems of Civil Service in the States," *Amer. Polit. Sci. Rev.*, XIX, 544-560 (Aug., 1925). For an extended list of references on civil service reform, see P. O. Ray, *Introduction to Political Parties and Practical Politics* (3rd ed.), 595-605.

²See pp. 288-294.

³Maryland puts the administration of the law in the hands of a single commissioner. See F. Telford, "The One-Man Civil Service Commission in Maryland," *Nat. Mun. Rev.*, XII, 358-362 (July, 1923); O. C. Short, "The Maryland One-Man Civil Service Commission," *Nat. Mun. Rev.*, XV, 153-157 (Mar., 1926). California also had a one-man commission, 1925-27, but in the latter year the legislature reestablished a commission of three members, similar to the Massachusetts commission.

to transfer employees from one branch of the service to another so as to bring about the appointment to competitive positions of personal or political friends without subjecting them to the inconvenience of passing the required examinations. If, however, the governors of the states can be made to feel that public opinion will emphatically condemn this playing fast and loose with civil service regulations, we shall soon find the laws administered in a manner that commands general respect.

Down to the present time, civil service commissions—national, state, and municipal—have practically everywhere confined their activities to the preparation and conduct of competitive examinations. They, and the general public, have assumed that the main, if not the sole, function of such commissions is to keep spoilsmen out of the public service. That function is of the first importance, and will always remain so; there should be no let-up in that work. Nevertheless it is becoming more and more apparent that the commissions should not stop with this negative function. In numerous direct and positive ways—by assuming new, or comparatively undeveloped, functions as the personnel or employment division of the state corporation—civil service commissions, if composed of men of vision, energy, and practical experience as employers, can enhance the general efficiency of state administration. By devising and putting into operation methods of measuring and increasing the efficiency of state employees, by stimulating in them ambition for promotion, by enlarging their opportunities for self-improvement, and by establishing uniform standards of compensation, civil service commissions have it in their power to make far greater contributions to the general efficiency of state government than most of them have made in the past.¹

¹The merit system has made greater headway in the field of municipal government than in that of state government. The work of civil service commissions in the two fields, however, is not fundamentally different. Hence the recent discussions of ways and means of improving municipal civil service administration should prove of much value in the administration of the state civil service law. See Governmental Research Conference Report, *The Character and Functioning of Municipal Civil Service Commissions in the United States* (Cleveland, 1922); National Municipal League, "Report of the Special Committee on Civil Service," *Nat. Mun. Rev.*, XII, 441-471 (Aug., 1923); also *40th Annual Report, U. S. Civil Service Commission* (Washington, 1922-23), pp. i-c; *Public Personnel Studies*, II, 13-59 (Mar.-Apr., 1924), "Methods of Selecting Employees to Fill High Grade Positions in the Public Service"; C. P. Messick, "The Personnel Agency as an Integral Part of Public Administration," *ibid.*, V, 1-10 (Jan., 1927); E. L. Trinkle, *Report on the State Personnel Situation in Virginia to the General Assembly, January, 1926* (Richmond, 1926).

REFERENCES

- J. M. Mathews, *Principles of American State Administration* (New York, 1917).
- , *American State Government* (New York, 1924), Chaps. IX-X, XII-XV.
- W. F. Dodd, *State Government* (New York, 1922), Chaps. IX-XI.
- A. N. Holcombe, *State Government in the United States* (2nd ed., New York, 1926), Chap. XI.
- A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), I, 350-354; 682-684; III, 382-385.
- W. B. Munro, *Government of the United States* (rev. ed., New York, 1925), Chap. XXXII.
- J. T. Young, *The New American Government and its Work* (rev. ed., New York, 1923), Chaps., XVII-XX.
- E. Kimball, *State and Municipal Government in the United States* (Boston, 1922), Chaps. VIII-IX.
- J. D. Barnett, "Representation of Interests in Administration," *Nat. Mun. Rev.*, XII, 347-349 (July, 1923).
- J. M. Turner, "Democracy in Administration," *Amer. Polit. Sci. Rev.*, XVII, 216-230 (May, 1923).
- C. G. Haines, *The Movement for the Reorganization of State Administration* (Austin, 1918).
- G. A. Weber, *Organized Efforts for the Improvement of Methods of Administration in the United States* (New York, 1920).
- T. H. Reed and E. B. Schulz, "The Organization of State Administration in Michigan," *Public Affairs*, III, No. 10 (Dec., 1924).
- D. P. Barrows, "Reorganization of State Government in California," *California Law Rev.*, III, 91-102 (Jan., 1915).
- C. P. Patterson, "The Board of Control in Texas," *Southwestern Polit. Sci. Quar.*, V, 39-46 (June, 1924).
- C. E. McCombs, "State Welfare Administration and Consolidated Government," *Nat. Mun. Rev.*, XIII, Supplement, 461-473 (Aug., 1924).
- W. F. Dodd, "Reorganizing State Government," *Annals of Amer. Acad. of Polit. and Soc. Sci.*, CXIII, 161-170 (May, 1924).
- J. K. Pollock, Jr., "Four Years under the Ohio Reorganization Code," *Nat. Mun. Rev.*, XIV, 554-564 (Sept., 1925).
- A. E. Buck, "Recent Steps Toward Administrative Consolidation in State Governments," *ibid.*, XIV, 672-680 (Nov., 1925).
- B. F. Wright, Jr., "The Merit System in American States," *Univ. of Texas Bulletin* 2305, Government Series, No. 20 (1923).
- B. A. Arneson, "Constitutionality of Merit System Legislation," *Amer. Polit. Sci. Rev.*, XIII, 593-606 (Nov., 1919).
- M. Conover, "Merit Systems of Civil Service in the States," *ibid.*, XIX, 544-560 (Aug., 1925).
- P. Studensky, "Pensions in Public Employment," *Nat. Mun. Rev.*, XI, 97-124 (Apr., 1922).

774 INTRODUCTION TO AMERICAN GOVERNMENT

CHAP.
XXXIX

- L. D. White, "Scientific Research and State Government," *Amer. Polit. Sci. Rev.*, XIX, 38-50 (Feb., 1925).
- A. G. Thomas, *Principles of Government Purchasing* (New York, 1919).
- National Municipal League, *A Model State Constitution* (Pamphlet, New York, 1921), §§ 41-48, pp. 25-31.
- Annals of Amer. Acad. of Polit. and Soc. Sci.*, CXIII, 202-361 (May, 1924).
Series of articles on "Competency and Economy in Public Expenditures."
- B. Smith, *The State Police* (New York, 1925).
- New York Special Joint Committee on Taxation and Retrenchment, *State Expenditures, Tax Burden, and Wealth* (1926), Chap. II.

CHAPTER XL

STATE FINANCE

How to obtain the money requisite to carry on the numerous and varied activities mentioned in the preceding chapter, how to apportion the state's revenues among the different administrative enterprises and agencies, how to set and maintain the necessary safeguards against waste and corruption, how to limit the state's borrowing power, if at all, and how to link up state finances, in the narrower sense, with the finances of counties, towns, and other local government areas—these are problems second in importance and difficulty to none which we have thus far encountered in the field of state government. Certain of them, notably those pertaining directly to the raising and spending of money, call for some study at this point.¹

With respect to sources of revenue, it is not surprising to find marked differences among the forty-eight states; nor to discover that, in view of the steadily increasing cost of state government, almost every state has been obliged not only to increase the amounts derived from old sources of income, but to cast about for new ones.² In general, the revenues of the state now fall into the following nine categories.

Sources
of state
revenue

(1) Earnings of public service enterprises established and maintained by the state, such as docks, wharves, warehouses, ferries, toll-bridges, canals, mills and elevators, vineyards, and land settlement.³

¹The constitutional limitation on taxation and indebtedness have been summarized in Chap. xxxvi. On these phases of state finance, see H. Secrist, "An Economic Analysis of the Constitutional Restrictions upon Public Indebtedness in the United States," *Univ. of Wis. Bull.*, VIII, No. 1 (1914).

²An interesting and valuable study of the increase in the cost of state government in New York is to be found in the report of the Special Joint Committee on Taxation and Retrenchment on *State Expenditures, Tax Burden, and Wealth* (1926). See also C. M. Puckette, "Costs of Government Rise to Record Height," *N. Y. Times*, June 5, 1927; C. Heer, "Rising Cost of State Government: Popular Theories versus Fiscal Facts," *Nat. Mun. Rev.*, XV, 277-282 (May, 1926); "State Expenditures—Has Their Upward Climb Been Justified?" *ibid.*, XVI, 322-328 (May, 1927).

³The total from this source in 1926 was only \$10,893,545. Of this sum 74.8 per cent came from the two states of North Dakota and California. These figures and those in the notes which follow are taken from the Bureau of the Census, *Financial Statistics of States* (1926).

(2) Fees, or highway-privilege dues, exacted from individuals or corporations enjoying a special privilege of using the streets and roads of the state in providing public services, such as those furnished by electric railways, lighting, telephone, and water companies.¹

(3) Receipts from the rental of real estate held principally or wholly for investment purposes, such as the income from school lands, especially in the western states.²

(4) Interest received on sinking funds, public trust funds, and on current deposits of state money in banks.³

(5) Fees, charges, and earnings accruing to the general departments of the government, *i.e.*, the various administrative agencies, state institutions, and the courts. Included here are fees for inspections, charges for filing, copying, or recording legal documents, tuition and other fees charged in state educational institutions and for the care of inmates of charitable institutions, and sometimes also the earnings of industries carried on in penal or charitable institutions.⁴

(6) Receipts from court fines imposed in criminal cases, from forfeiture of bonds, and from escheats, *i.e.*, property the owners of which cannot be ascertained or located.⁵

(7) Subventions or grants by the federal government, mainly for educational purposes and highway construction;⁶ also donations or gifts from private persons or corporations, the principal or income of which can be expended for designated state uses; and contributions by state employees toward pension or retirement funds.⁷

(8) Special assessments and charges to defray the cost of

¹ Only eight states reported receipts from this source in 1926. The receipts, aggregating \$130,157, came principally from electric railways for paving between tracks and for the use of state bridges. The largest amount, \$47,073, was reported by Connecticut.

² In 1926, \$15,965,912 was derived from this source, the largest amount, \$4,203,626, being reported by Texas.

³ \$54,087,334 was derived from this source in 1926.

⁴ General departmental earnings in 1926 amounted to \$129,288,544. See E. C. Potter, "The Earnings of Public Welfare Institutions. . . ." *Annals Amer. Acad. Polit. and Soc. Sci.*, CXIII, 135-146 (May, 1924).

⁵ From this source \$7,506,904 was received in 1926.

⁶ See pp. 560-563.

⁷ The total amount derived from these sources in 1926 was \$139,148,513. Of this amount, \$115,473,805 was received from the federal government as subsidies or grants, \$84,195,545 being for highways and \$11,778,829 for education, including contributions toward the support of state universities and agricultural and mechanic colleges. Contributions to pension or retirement funds amounted to \$14,587,312. See A. F. MacDonald, "The American Subsidy System," *Nat. Mun. Rev.*, XIV, 692-701 (Nov., 1925).

specific public improvements or public services undertaken primarily in the interest of the public, such as for the cost of highway construction and repair, for forest-fire patrol, and for maintenance of drainage districts.¹

OHAP.
AL
—

(9) Large, however, as are the sums obtained in some states from these varied sources, by far the greatest amount of revenue is derived from taxation.² The most productive kinds of taxation, one or more being found in every state, are the following: (a) corporation taxes,³ which may assume a variety of forms, such as a tax upon the capital stock, corporate indebtedness, deposits held by banks, value of insurance policies, or "corporate excess;"⁴ (b) inheritance and estate taxes, which are now found in all the states except Alabama, Florida, and Nevada, and usually take the form of graduated or progressive taxes applied to both direct and collateral inheritances, although in some states only the latter are taxed;⁵ (c) personal and corporation income taxes, now (1928) employed in eleven states;⁷ (d) mortgage-recording taxes; (e)

Different
kinds of
taxes

¹The total from this source in 1926 was \$28,106,643.

²In general, it may be said that a state has the right to tax all persons, including corporations, residing or doing business within its bounds, and all forms of property located within the state, except in so far as this right may be restricted by provisions in the state constitution. To this generalization, however, there are important exceptions. For example, states may not tax imports from foreign countries, interstate commerce, or the agencies, instrumentalities, or property of the national government, at least in such a manner as to impair their efficiency. See pp. 145-148. J. T. Young, *The New American Government and its Work* (rev. ed.), Chap. xxi.

³The sum of \$95,264,620 was derived from corporation taxes in 1926. Educational, charitable, and religious corporations are almost always exempted, in whole or in part, from the taxes which are imposed upon corporations organized for profit. See *Report of the [New York] Special Joint Committee on Taxation and Retrenchment*, "Tax Exemption in New York" (1927). On the taxation of public utilities, see *Report of the [New York] Special Joint Committee on Taxation and Retrenchment* (1922), 92-120; *ibid.* (1924), 99-124.

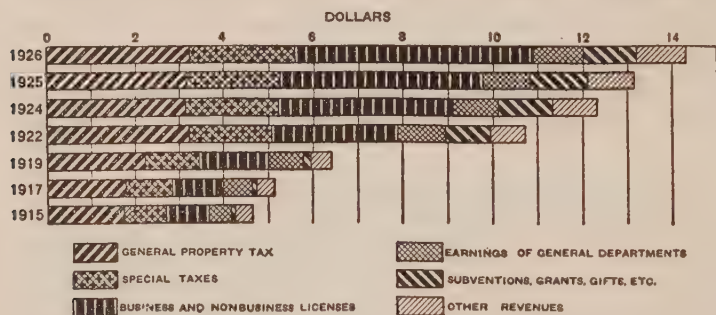
⁴"The corporate excess is the remainder found by deducting the assessed value of the tangible property from the equalized market or actual value of the capital stock, plus bonded indebtedness." J. M. Mathews, *Principles of American State Administration*, 250.

⁵The amount derived from inheritance and estate taxes in 1926 was \$90,631,734. See national Committee on Inheritance Taxation, *Report to the National Conference on Estate and Inheritance Taxation* (1925); R. A. Vandegrift, *Inheritance Tax Analysis* (Los Angeles, 1927); M. West; "The Inheritance Tax," *Columbia Univ. Studies in Hist., Econ., and Public Law*, IV, No. 2 (2nd ed., 1908).

⁷\$38,628,233 was derived from this source by the twelve states using it in 1926, namely, Maryland, Massachusetts, Mississippi, Missouri, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, West Virginia, and Wisconsin. Oregon no longer levies an income tax. See A. Comstock, "State Taxation of Personal Incomes," *Columbia Univ. Studies in Hist., Econ., and Public Law*, XCVI (1921).

poll taxes, including all per capita taxes, uniform or graded;¹ (f) specific taxes upon property without regard to value, for example, on land per acre or on cattle per head; (g) business taxes, exacted from persons or corporations in proportion to the volume of their business or by reason of the business in which they are engaged; *e.g.*, motor fuel or gasoline taxes and taxes on insurance and other incorporated companies;² (h) non-business license taxes, exacted primarily for the purpose of regulation, including taxes on motor vehicles, hunting and fishing, and dogs;³ and (i) the general property tax. Because of its widespread use, the prevalent dissatisfaction with it in many states, and its intimate relation to

PER CAPITA REVENUE RECEIPTS, BY PRINCIPAL CLASSES, OF
THE 48 STATES FOR SPECIFIED YEARS: 1915-1926



Reproduced, by permission, from the Bureau of the Census, *Financial Statistics of States*, 1926.

the chief problems of tax reform, the general property tax calls for somewhat more detailed consideration.

Until recently the general property tax was the chief single source of state revenue, the amount derived from it as late as 1915 being about forty per cent of the total state income. Since that date (as the accompanying diagram will show), there has been a marked falling off in the proportion of revenue derived from

¹ The eleven states using this tax in 1926 reported only \$3,659,012—California, Colorado, Georgia, Indiana, Maine, New Hampshire, Texas, Vermont, Virginia, Washington, West Virginia.

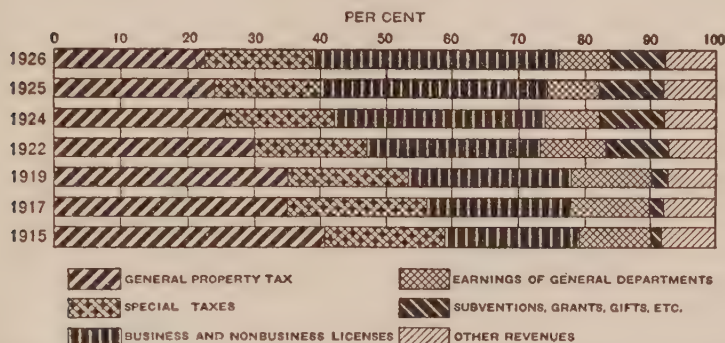
² From business taxes the state derived \$372,388,128 in 1926, of which \$136,749,865 came from motor fuel, or gasoline, taxes. These last are now levied in all but four states—Massachusetts, New Jersey, New York, and Illinois. The Illinois gasoline tax, authorized in 1927, was held unconstitutional by the state supreme court in February, 1928. See J. W. Martin, "The Administration of Gasoline Taxes in the United States," *Nat. Mun. Rev.*, Supplement, XIII, 587-600 (Oct., 1924); E. P. Learned, "State Gasoline Taxes," *Univ. of Kansas, Humanistic Studies*, III, No. 4 (1925).

³ Non business license taxes produced, in 1926, \$244,241,161, of which, \$233,933,855 came from motor vehicle licenses. See H. A. Barth, "State Taxation of Passenger Automobiles," *Nat. Mun. Rev.*, XIII, 641-651 (Nov., 1924).

it—a decline from 40.6 to 22.7 per cent;¹ and a corresponding increase in the amount derived from business and non-business license taxes—from 20.3 to 37.2 per cent. A number of states, notably California and Pennsylvania, make little or no use of the general property tax for state purposes.² In those states, however,

CHAP.
XL

PER CENT DISTRIBUTION OF RECEIPTS OF THE 48 STATES FROM THE SEVERAL SOURCES OF REVENUE FOR SPECIFIED YEARS: 1915-1926



Reproduced, by permission, from the Bureau of the Census, *Financial Statistics of States, 1926*.

as in all others, it is the main reliance for the support of county and other local government units.³

¹ In 1926 the total amount raised by the general property tax for state purposes was \$375,674,160.

² This statement also holds true for Delaware, New York, North Carolina, Ohio, and Wisconsin.

³ In 1922, the total amount of general property taxes for state and local purposes was \$3,503,725,000—an increase of 159.6 per cent over the amount raised in 1912. In all the states except Massachusetts, Georgia, and Arkansas, the total general property tax in 1922 was more than 100 per cent greater than in 1912; and in ten states the increase was over 200 per cent. U. S. Bureau of the Census, *Wealth, Public Debt, and Taxation: 1922*, "Assessed Valuation and Tax Levies," 7.

Brief discussions of the general subjects of state revenue and taxation will be found in J. M. Mathews, *Principles of American State Administration*, Chaps. x-xi; J. T. Young, *The New American Government and its Work* (rev. ed.), Chaps. xxi; *Ill. Const. Conv. Bull.* No. 4 (1920), "State and Local Finance"; W. F. Dodd, *State Government*, Chap. xvi. See also A. Youngman, "The Revenue System of Kentucky; A Study in State Finance," *Quar. Jour. Econ.*, XXXII, 142-205 (Nov., 1917), and M. L. Faust, "Sources of Revenue of the States, with Special Study of the Revenue Sources of Pennsylvania," *Annals of Amer. Acad. Polit. and Soc. Sci.*, XCV, 113-122 (May, 1921).

For recent critical studies of the tax system in Pennsylvania, Ohio, and West Virginia, see F. P. Weaver and C. L. King, "Some Phases of Taxation in Pennsylvania," *Bull. Penna. Dept. of Agric.* (Dec., 1926); *Final Report of the Pennsylvania Tax Commission to the General Assembly* (1927); *Report of the Joint Legislative Committee on Economy and Taxation of the 36th General Assembly of the State of Ohio* (1926); *Report of the West Virginia State Tax Commission*. . . (1927).

This tax is an *ad valorem* levy upon real estate and upon both tangible and intangible personal property. Its original purpose was to spread the public burden as equitably as possible over all persons in accordance with their respective abilities to contribute, measured by the value of the property they owned. Its history goes back to a period in which people were profoundly influenced by a political philosophy which insisted upon the strict equality of all men before the law. It was assumed that the natural equality of men extended not only to their persons but to their property, so that it was regarded as an act of discrimination and fundamental injustice to tax one form of property at a different rate from another.

In early times the application of this theory worked no real injustice. Houses and lands could not, of course, be concealed; and practically all personal property was tangible, consisting mainly of horses, cattle, wagons, farm implements, tools, grain, merchandise, and household furniture. All these could be easily located and their value determined by the tax assessor; so that comparatively little, if any, taxable property escaped paying its just share. In the past seventy years, however, there has been an enormous increase in the amount and variety of intangible personal property, especially in the form of stocks, bonds, and mortgages; so that, taking the country as a whole, the value of intangibles is now greatly in excess of the value of real property subject to taxation. These newer forms of personal property are easily concealed, and the owner has every temptation to conceal them when the rate of taxation, determined primarily with reference to real estate and tangible personal property, is such as to compel him to yield up in taxes from one-fourth to one-half, or even more, of the net income derived from these securities—a result which really amounts to confiscation.

Under present conditions, the uniform general property tax in many states is neither uniform nor universal nor equitable. Real property usually bears more than its fair share of taxation, but there is often the greatest lack of uniformity in the valuations placed upon the same class of real estate located in different parts of the same state, and even within the same county. Personal property, on the other hand, either is notoriously undervalued or escapes taxation altogether. Some interesting instances of undervaluation are revealed in the Illinois state tax reports. Illinois ranks high as an agricultural state; but the assessed value of

THE NEW YORK STATE TAX SYSTEM—1921

Special Joint Committee on Taxation and Retrenchment

Title of tax	Payment annual or single	Basis of tax	Measure of tax	Rate of tax	Administration of tax			Disposition		Estimated productivity of tax for 1921	
					Assessment	Levy	Collection	State	Local	For the State	For the local units
General property tax ¹	Annual...	Real property including special franchises. Tangible personalty of individuals, partnerships and public utilities.	Value of property.....	Fixed locally to meet budget requirements.	By local assessors. Special franchises by State Tax Commission.	Levied annually; local taxes by local legislative bodies; State tax by State Legislature; county and town taxes by county supervisors; school taxes by school board in certain jurisdictions.	Local collectors and receivers of taxes.	Part, depending on basis of levy.	Part to municipalities, depending on basis of levy.	\$35,068,524	\$400,000,000
Bank stock tax ²	Annual...	Bank stock.....	Value of shares.....	1 per cent flat.....	Local assessors.....	County supervisors....	County treasurer...	None.....	To cities, towns, villages and school districts on basis of previous aggregate assessed valuation.		6,000,000
Corporation organization tax.	Single....	Organization of stock corporation.	Authorized capital stock.	1/20 of 1 per cent; if no designated value to stock, 5 cents per share; not less than \$10.	Secretary of State....	Permanent tax levied by State Legislature.	State treasurer.....	All.....	None.....	1,500,000	
License tax, foreign corporations.	Single....	Privilege of doing business in this State as a corporation.	Capital stock employed in this State during first year of business.	1/8 of 1 per cent, but not less than \$10.	State Tax Commission	Permanent tax levied by State Legislature.	State comptroller...	All.....	None.....	121,600	
Franchise tax, domestic and foreign corporations.	Annual...	Domestic corporations, for privilege of doing business in this State as a corporation; foreign corporations, for privilege of doing business in this State.	Capital stock employed in this State during preceding year.	Graduated rates depending on dividends, relation of assets to liabilities and average price of stock sold.	State Tax Commission	Permanent tax levied by State Legislature.	State comptroller...	All.....	None.....	1,915,200	
Additional franchise tax, transportation and transmission corporations.	Annual...	Privilege of doing business in this State as a corporation.	Gross intrastate earnings.	5/10 of 1 per cent....	State Tax Commission	Permanent tax levied by State Legislature.	State comptroller...	All.....	None.....	2,216,900	
Franchise tax, elevated and surface roads not operated by steam.	Annual...	Privilege of doing business in this State as a corporation.	Gross earnings in this State and dividends declared or paid in excess of 4 per cent on paid-up capital.	1 per cent of gross earnings and 3 per cent of dividends in excess of 4 per cent upon paid-up capital.	State Tax Commission	Permanent tax levied by State Legislature.	State comptroller...	All.....	None.....		
Franchise tax on water, gas, electric or steam heating, lighting or power companies.	Annual...	Privilege of doing business in this State as a corporation.	Gross earnings in State. Also dividends declared or paid in excess of 4 per cent on paid-up capital employed in this State.	5/10 of 1 per cent of earnings and 3 per cent of dividends in excess of 4 per cent.	State Tax Commission	Permanent tax levied by State Legislature.	State comptroller...	All.....	None.....	1,111,000	
Franchise tax, insurance corporations.	Annual...	Privilege of doing business in this State as a corporation.	Excess of gross amount of premiums charged, over deductions allowed by law, for business in the State during previous year.	1 per cent.....	State Tax Commission	Permanent tax levied by State Legislature.	State comptroller...	All.....	None.....	3,388,000	
Franchise tax, trust companies.	Annual...	Privilege of doing business in this State as a corporation.	Amount of capital stock, surplus and undivided profits.	1 per cent.....	State Tax Commission	Permanent tax levied by State Legislature.	State comptroller...	All.....	None.....	3,190,000	
Franchise tax, investment companies.	Annual...	Privilege of doing business in this State as a corporation.	Face value of capital stock. Also surplus and undivided profits.	1 1/4 mills on capital stock and 1 per cent of surplus and undivided profits.	State Tax Commission	Permanent tax levied by State Legislature.	State comptroller...	All.....	None.....	22,300	
Franchise tax, savings banks.	Annual...	Privilege of doing business in this State as a corporation.	Par value of surplus and undivided earnings.	1 per cent.....	State Tax Commission	Permanent tax levied by State Legislature.	State comptroller...	All.....	None.....	1,430,000	
Privilege tax on foreign bankers.	Annual...	Privilege of doing business in this State.	Interest, etc., earned on any money used or employed in this State.	5 per cent.....	State Tax Commission	Permanent tax levied by State Legislature.	State comptroller...	All.....	None.....	445,000	
Franchise tax, business corporations, domestic and foreign. ³	Annual...	Domestic corporations, for privilege of doing business in this State as a corporation; foreign corporations, for privilege of doing business in this State.	Apportioned entire net income for fiscal or calendar year preceding.	4 1/2 per cent.....	State Tax Commission	Permanent tax levied by State Legislature.	State comptroller...	3/4 of tax and all interest and penalties.	1/4 to county treasurers to be distributed to cities and towns on basis of location of tangible personal property of corporation taxed.	19,860,000	9,900,000
Transfer tax.....	Single....	Transfer of all property by will or by intestate law.	Appraised value of all property, real or personal, tangible or intangible, and any interest therein or income therefrom.	Graduated scale, 1 to 8 per cent.	Surrogate, after report by appraiser.	Permanent tax levied by State Legislature.	State comptroller...	All.....	None.....	17,500,000	
Mortgage tax.....	Single....	Mortgages on real property situated in the State.	Amount of debt secured.	50 cents for each \$100 and each remaining major fraction.	Recording officer....	Permanent tax levied by State Legislature.	Recording officer....	1/4.....	1/4 retained by county to be distributed to cities and towns on basis of location of property.	2,750,000	2,750,000
Stock transfer tax.....	Single....	The sale, agreement to sell or transfer of any stock in domestic or foreign corporations.	Face value of stock...	2 cents per \$100 or fraction thereof, except where no face value, then 2 cents per share.	Vendor or transferor..	Permanent tax levied by State Legislature.	State comptroller through sale of stamps.	All.....	None.....	8,520,000	
Personal income tax.....	Annual...	Person.....	Net income of residents; of non-residents, net income derived in this State.	Graduated scale, 1 to 3 per cent.	State comptroller....	Permanent tax levied by State Legislature.	State comptroller...	\$250,000 fund for refunds; 1/2 of remainder to state treasury.	Other half distributed through the counties to cities and towns in proportion to their assessed real estate valuations.	16,500,000	16,400,000
Registration of motor vehicles. ⁴	Annual...	Ownership and operation of motor vehicles in the State.	Horsepower, value, seating capacity, carrying capacity, and weight, depending on type of vehicle.	Varying schedules....	Secretary of State....	Permanent tax levied by State Legislature.	Secretary of State...	1/2 to state.....	1/2 to counties to be distributed to towns as determined by board of supervisors.	4,635,000	4,300,000
Foreign insurance corporations.	Annual...	Privilege of doing business in this State.	Premiums received for insurance placed in this State.	1 per cent of net premiums to 2 per cent gross premiums depending on type of insurance written and on place of incorporation.	Superintendent of insurance.	Permanent tax levied by State Legislature.	Superintendent of insurance, except fire which goes to local authorities.	All except fire.....	None except fire.....	1,360,000	300,000
Shellfish grounds.....	Annual...	Shellfish grounds owned, leased or possessed.	Acreage.....	25 cents per acre.....	Conservation Commission.	Permanent tax levied by State Legislature.	Conservation Commission.	All.....	None.....	25,100	
Total estimated tax revenues from above sources.....										\$121,558,524	\$439,650,000

¹ Money and tangible personal property are exempt; tangible personal property of business corporations and trust and investment companies is exempt; licensed motor vehicles, except those of unincorporated manufacturers and dealers, and licensed motor-cycles are exempt; new dwelling houses, in certain jurisdictions, and household furniture and personal effects to the value of \$1,250 are also exempt.

² In lieu of all other state and local taxes upon shares of stock or other personal property and in lieu of franchise taxes where fiduciary powers are exercised.

³ In lieu of general property tax on personal property and capital stock. Does not apply to certain corporations.

⁴ In lieu of personal property taxes on motor vehicles.

her live-stock in 1925 would never lead one to suspect it, for horses were averaged at \$21.89, cattle at \$14.16, hogs at \$4.03, and sheep at \$2.57.¹ Undervaluation probably also accounts for the fact that the average assessed value of carriages and wagons was only \$10.07; of automobiles, \$76.15; of watches and clocks, \$3.85; of sewing and knitting machines, \$4.67; and of pianos, \$27.51. Undervaluation, however, is obviously better than no valuation, and that much personal property escapes taxation altogether may be inferred from a few other Illinois instances. In Chicago, the second largest and wealthiest city in the western hemisphere, the full cash value of all diamonds and jewelry owned was, according to the tax reports for 1911, the ridiculously low sum of about half a million dollars. From the same tax returns one might infer that watches and clocks were luxuries enjoyed only by the favored few, for apparently only one person in 188 owned any. If luxuries in 1911, they must have become curios by 1925 when only one person in 320 possessed a time-piece! But Chicagoans were apparently better off in that respect than the people of Kankakee county (population, 46,449), where modern time-pieces seem practically to have vanished, since only eight persons admitted to the tax officials that they owned a watch or a clock! Almost ten million hogs, five million sheep, and four million cattle were received and sold in the Chicago markets during the year 1913; yet the tax records show that in the whole of Cook county there were assessed for taxation only 26,500 cattle, 683 sheep, and 8,085 hogs. These records also show that the grain elevators and warehouses of Chicago held in storage on the first day of April, 1918, grain having an assessed value of only \$779,644, whereas the actual market value of the millions of bushels held in storage on that date was \$17,778,700.²

In many communities the assessment of personal property taxes is almost wholly restricted to those persons whose names are on the assessment rolls as the owners of taxable real estate. It is, of course, physically impossible for the tax authorities to assess all tangible personal property from actual view; hence it has become customary in many places to require the taxpayers themselves to

CHAP.
XL

Self-
assessment
by owners
of personal
property

¹ Illinois Tax Commission, *Seventh Annual Report* (1925), 11-22.

² Report of the Sub-Committee of the Revenue Committee of the Illinois House of Representatives (1918). See also R. M. Haig, "History of the General Property Tax in Illinois," *Univ. of Ill. Studies*, III; J. A. Fairlie, *Report on the Taxation and Revenue System of Illinois* (1910); *Ill. Const. Conv. Bull.*, "Constitutional Conventions in Illinois" (1920), 76-89; *ibid.*, No. 4, "State and Local Finance" (1920).

make out sworn statements of their taxable property, a method which practically amounts to self-assessment. Under such circumstances, instead of being equal in proportion to ability to pay, the tax becomes progressive in proportion to the honesty of the tax payer in making out his tax-list. "It thus places a premium on dishonesty and has been justly described as a 'school of perjury.' " The upshot is that personal property everywhere fails to bear its proportionate share of the burden of taxation. The figures of the United States census bureau show that in 1922 the assessed value of real property and improvements subject to the general property tax was, for the entire country, over ninety-two billion dollars, while that of personal property was less than twenty-seven billions, though the true value of personal property was doubtless considerably greater than that of real estate.¹

The foregoing statements indicate in a very broad way some of the principal reasons why, in most states, the general property tax has come to be regarded as thoroughly unsatisfactory, and partial substitutes have been adopted. In over thirty states, defects of the general property tax which are traceable to the uniformity requirement have been greatly reduced, and to a considerable extent eliminated, by express or implied constitutional grants of authority to the legislature to classify different kinds of property and to impose a different rate of taxation upon the various classes, provided the tax is uniform for all property falling within any given class.

Examples are to be found in the New York mortgage and bank stock taxes and the Minnesota "money and credit tax." This classification system makes it possible, among other things, to impose a lower and more equitable rate upon intangibles than upon real estate, with the result that, by removing the motive for concealing such property from the assessors, vastly larger amounts are reported annually for taxation, with a consequent heavy increase in the revenue of the state from this source. This plan of taxing securities at a lower rate has also been adopted in Pennsylvania, Maryland, Iowa, Minnesota, Rhode Island, North Dakota, and other states, with generally far more satisfactory results than were obtained under the old uniform tax.²

¹ See *Report of the [New York] Special Joint Committee on Taxation and Retrenchment* (1922), 42-61.

² *Ill. Const. Conv. Bull.*, "Constitutional Conventions in Illinois" (1920), 76 ff. See also Fifth Annual Conference on State and Local Taxation, *Addresses and Proceedings*, V, 333-343, "Report of Committee on Practicable Substitutes for the General Property Tax."

Other widely adopted substitutes are inheritance and income taxes. So one may say that the trend of tax reform today is directly away from the once universal general property tax and toward the adoption of one or more of the substitutes named above.¹ On the whole, however, the movement for tax reform has progressed rather slowly, partly because of the fact that many people are able or willing to see only the theory upon which the general property tax is founded, rather than its actual operations; partly because of restrictions which prevent modification of the system without constitutional amendment;² and, lastly, because of the feeling of certain persons or classes of persons that any change in the system of taxation would affect their private interests adversely.

CHAP.
XL

Why tax
reform
moves
slowly

Not all of the defects connected with the general property tax, however, are inherent in the nature of the tax; some arise out of the methods by which the tax is assessed, and where these methods have been improved, in one or more of the ways indicated below, popular dissatisfaction with the system has to some extent abated.

The methods of levying and collecting the tax are, in their more fundamental features, the same in all of the states. The property is valued by a local assessor of the town, township, or county, as

Methods of
assessment

¹ In some states certain sources of revenue have been set aside for taxation for state purposes and other sources have been reserved for local taxation. "The principal sources reserved for state taxation are banks, insurance companies, public service corporations, inheritances, and incomes." M. Newcomer, "Separation of State and Local Revenues in the United States," *Columbia Univ. Studies in Hist., Econ., and Public Law*, LXXVI (1917). There has also been much discussion in recent years among students of public finance of the desirability of a similar differentiation of the objects of state and national taxation. In 1917 representatives of forty-two states met at Atlanta to propose measures for recommendation to Congress along this line. On this general subject, see E. R. A. Seligman, *Essays in Taxation* (8th ed., New York, 1913), Chap. XII; *Annals Amer. Acad. Polit. and Soc. Sci.*, LVIII, 1-11, 59-64, 105-111 (March, 1915); *Nat. Tax Assoc. Proceedings* (1919), 128-145; J. E. Boyle, "A Program for Redistributing Sources of Revenue as between Cities, States, and National Government," *Annals of Amer. Acad. Polit. and Soc. Sci.*, XCV, 272-276 (May, 1921).

² Constitutional amendments relating to taxation have been proposed in large and increasing numbers since 1900. Between 1900 and 1918, 257 amendments on taxation were submitted to popular vote, of which 141 were adopted and 116 failed. This movement has been widespread; one or more amendments have been submitted in all but six states, i.e., Vermont, Connecticut, Rhode Island, Delaware, New Jersey, and Indiana. *Ill. Const. Conv. Bull.*, No. 4 (1920), "State and Local Finance," 249. In 1920 constitutional amendments relating to taxation or finance were voted on in twelve states, eighteen being adopted and eight defeated. In 1922 ten amendments relating to taxation were voted on in eight states, four being adopted and six rejected. See W. E. Hannan, "State Tax Legislation in 1921," *Amer. Polit. Sci. Rev.*, XVI, 53-73 (Feb., 1922). In 1924, three states voted on ten taxation amendments, approving three and rejecting seven; in 1926, twenty taxation amendments were voted on, twelve being approved and eight rejected.

the case may be, and the same assessment lists are commonly used as the basis of state, county, and municipal taxation. Assessments of personal property are often made annually; those of real estate, usually once in three or four years. All property is supposed to be assessed either at its full market value or at some specified percentage thereof. In Illinois, for example, the basis of assessment was for a long time one-third of the real value, but has recently been increased to one-half. Although the work of assessing property for purposes of taxation is of the greatest importance, and ought to be done in accordance with scientific principles and methods, it is, as a rule, rather poorly performed. A main reason is that the assessors are commonly elective officials with no training which qualifies them to weigh the many factors entering into the determination of property values. "Much of what they do is mere guesswork."¹ Some improvement in the work of local assessment has been effected in a number of states, especially in a few of the larger cities, by lengthening the terms of assessors, giving them more adequate compensation, providing for appointment instead of popular election, and supplying them with modern tax maps, valuation tables, and other necessary tools; and much more might be accomplished in this direction.² Of course, the adoption of a "scientific" system of assessment does not dispense with the need for judgment nor eliminate the influence of other human factors. But, by furnishing the assessors with all the relevant facts, it does away with all unnecessary guessing; it encourages equality of treatment; and it brings the work of assessment out into the open where the public can know and understand what is going on.³

¹ For interesting comments on the qualifications of tax assessors elected in New York, and upon their methods of assessing property, see *Report of the Special Joint Committee on Taxation and Retrenchment* (1920), 117-134; *ibid.* (1921), 48-62; *ibid.* (1923), 103-127.

² See L. Purdy, "The Assessment of Real Estate," *Nat. Mun. Rev.*, Supplement, VIII, 512-527 (Sept., 1919); W. A. Somers, "The Valuation of Real Estate for Taxation," *ibid.*, II, 230-238 (April, 1913); H. L. Lutz, "The Somers System of Realty Valuation," *Quar. Jour. Econ.*, XXV, 172-181 (Nov., 1910); W. B. Munro, *Principles and Methods of Municipal Administration* (New York, 1916), Chap. x.

³ That scientific assessment also pays in dollars and cents appears from the following comment by a recent mayor of Buffalo on the adoption of such a system in that city, at a cost of \$60,000: "As a result of this work, in four years' time, \$177,000,000 has been added to the total assessed value of real estate. This has increased the borrowing capacity of the city. It has inflicted hardship on no one because the assessments are now based on actual and careful measurements and surveys, and thus are impartial. It has made it possible for the city to have the best of credit during the period of the War. . . . Many cities suffered financial distress, but Buffalo has been in an easy and comfortable position. . . ." G. S. Buck, in *Nat. Mun. Rev.*, IX, 94-95 (Feb., 1920).

In property assessments made by untrained and locally chosen officials working independently in their several localities great inequalities inevitably appear in the valuations placed upon the same sort of property in different parts of a state, and even in different parts of the same county. In the case of real estate, these have been known, in one section or another, to vary from ten to over a hundred per cent of the actual value. To correct, in some measure, these inequalities, there is in a few states, immediately above the local assessor, a city or township board of review with power to increase or decrease individual assessments. Above this local board, or above the local assessors, there is usually a county board of review, or some officer, like the county treasurer, whose duty it is to equalize the aggregate assessment of the townships or other taxing districts within the county, and who may also usually change individual assessments. These county and other boards of review are commonly *ex-officio* bodies, "who are either constituted judges of their own work of assessment or else are too unfamiliar with conditions with which they are called upon to deal. Hence the work of such boards is largely ineffective; political influences not infrequently enter into their determinations, and sometimes their conduct of official business has degenerated into a contest between groups of members representing urban and rural taxing districts, respectively, in which entire valuations of districts are arbitrarily increased or diminished."¹ Finally, in all but a few southern states there is a state board of equalization, performing functions for the entire state similar to those performed for the counties by the county boards of review. In a number of states this duty has been conferred upon permanent state tax commissions, which also have other important functions; while in still other states certain elective state officers, acting *ex-officio*, serve as the state board of equalization. The work performed by the last kind of state board has, on the whole, tended to become more or less perfunctory.

Although reform in the administration of the general property tax is primarily of importance to the local communities, the state itself has a very direct interest therein from the standpoint both of safeguarding its sources of revenue and of increasing the efficiency of its administrative machinery. Such considerations have led to the introduction of state central supervision in a large number of states, and with especially good results in the thirty-

CHAP.
XL
Equaliza-
tion of
assessments

State
central
supervision

¹ J. M. Mathews, *Principles of American State Administration*, 234.

odd states that now have permanent tax commissions. In a few states, notably Massachusetts and West Virginia, this work is attended to by a single official or tax commissioner; but in most cases the commission is composed of either three or five members serving from four to six years, and usually appointed by the governor and senate.

The more effective state tax commissions have been empowered (a) to supervise tax assessment and administration throughout the state, and (b) to make the assessment of certain kinds of property which are especially difficult to assess locally, for example, railroads, telegraph and telephone systems, express and sleeping-car services, and other public utilities. They have also taken over the equalization of assessments in the different counties or townships of the state, and issue instructions to assessors and other tax officials regarding the proper performance of their duties, including methods of procedure, accounting, and recording.¹ Counties are regularly visited, investigations conducted, prosecutions of delinquent officials or taxpayers instituted, and periodical reports submitted either to the governor or to the legislature. The powers exercised by these state commissions vary greatly, but the most effective instrument yet placed in their hands for controlling the work of local assessors consists of the right to investigate taxation conditions generally, to make intensive studies of the assessment work in particular localities, and, especially, to order a reassessment of particular pieces of property or of entire taxing districts. "The work of state tax commissions has undoubtedly brought about in most states a very decided increase in the percentage of actual assessments to full value," and also a "diminution of the inequalities between taxpayers and tax districts, and a general invigoration of the entire system of tax administration."²

From what has been said, it is clear that the general property tax is primarily a locally administered tax. This is not true of most of the other state taxes or other forms of state revenue,

¹ H. L. Lutz, "The State Tax Commission and the Property Tax," *Annals of Amer. Acad. Polit. and Soc. Sci.*, XCV, 276-283 (May, 1921), and *The State Tax Commission* (Cambridge, 1918). By legislation enacted in 1919 and 1921, the Indiana tax board was authorized to allow or disallow budgets, or tax levies, voted by local taxing bodies; and also to approve or disapprove local bond issues in excess of \$5,000. P. Zoercher, "The Indiana Scheme of Central Supervision of Local Expenditures," *Nat. Mun. Rev.*, XIV, 90-95 (Feb., 1925); *ibid.*, XIV, 188-189 (Mar., 1925).

² Mathews, *op. cit.*, 248. See *Municipal Research*, No. 81 (1917), "Some Results and Limitations of Central Financial Control"; J. A. Estey, "Indiana's Tax Reforms," *Nat. Mun. Rev.*, IX, 411-413 (July, 1920).

e.g., taxes on the property of railroads. The assessment and collection of these state taxes are commonly entrusted either to the state tax commission or to some other state board or officer, such as the state treasurer or comptroller, and the tax rate is often fixed by law. Sometimes, however, there is a division of responsibility between state and local authorities in the assessment of corporate property. Thus, in Illinois certain portions of the real and personal property of all railroads, except the Illinois Central Railroad, are assessed by the local assessor, while the track, rolling-stock, and corporate excess are assessed by the state tax commission.

CHAP.
XL

When the amount of state appropriations for a given period has been determined and the amount of revenue receivable by the state from all sources except the general property tax is approximately known, the tax rate for the state's share of the property tax is determined by arithmetical calculation. In some states the rate is fixed by the legislature, but in others by a state official or board.¹ The state tax, however, is only one of several taxes usually collected: a taxpayer's bill almost always includes also a county tax, a city, village, or township tax; and frequently in addition to these, a tax for highways, for schools, for parks, and perhaps for still other purposes. This is due to the existence of overlapping areas of local government, and so a citizen may find himself living in the jurisdiction of half a dozen, or even more, distinct taxing bodies.

The tax
rate

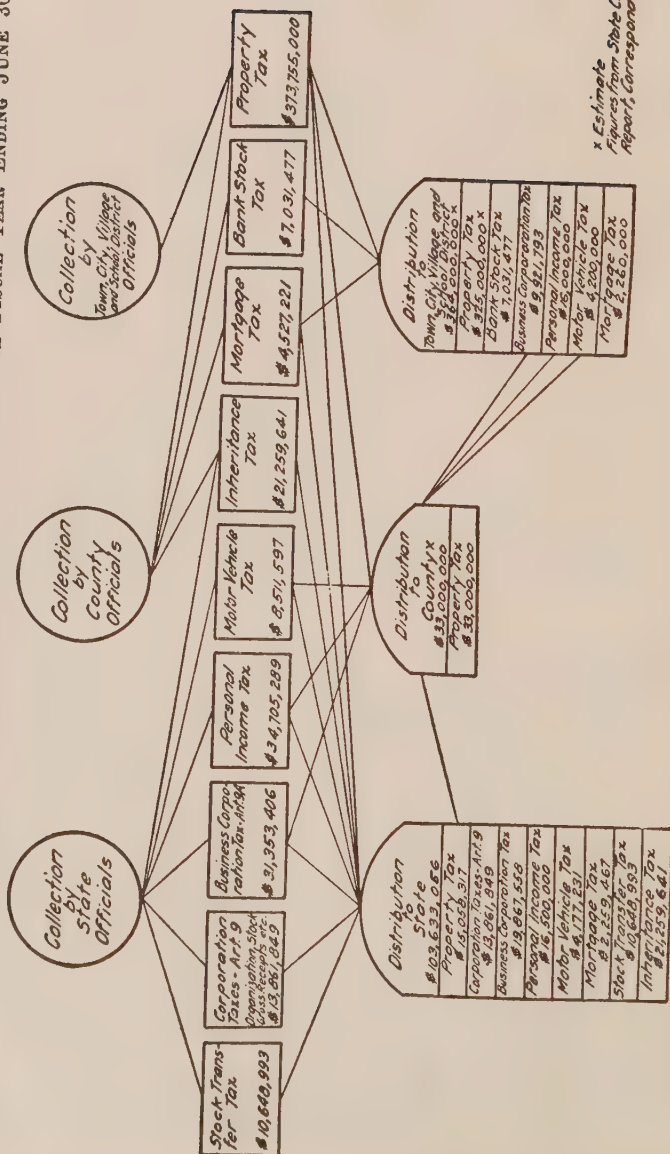
The collection of the state's revenues, especially the portion arising from the general property tax, is usually placed in the hands of local officers, and the amounts received, in so far as they belong to the state rather than the local divisions, are transmitted by the county collector or treasurer to the state treasurer. The amount or proportion of money raised by the general property tax that goes into the state treasury for state purposes is relatively small; by far the greater part is retained by county and other local government units.² Local collection of state revenue is not economical, the expense involved sometimes consuming a large percentage of the gross proceeds. In contrast to this decentralized method employed in the assessment and collection of general prop-

Collection
of taxes

¹ In Illinois the state tax rate is determined by the governor, state treasurer, and auditor of public accounts.

² In Illinois, in 1921, only eight per cent of the revenue accruing from taxation went to the state, the remainder being distributed as follows: school districts, forty-one per cent; cities and villages, twenty-eight per cent; counties, ten per cent; roads and bridges, seven per cent; park districts, five per cent; and townships, one per cent.

COLLECTION AND DISTRIBUTION OF TAXES IN NEW YORK STATE FOR THE FISCAL YEAR ENDING JUNE 30, 1920



(Reproduced, by permission, from the Report of the Special Joint Committee on Taxation and Retrenchment—Submitted March 1, 1922.)

erty taxes are the methods employed for the collection of other state revenues. In the case of income taxes, for example, Wisconsin, Massachusetts, and New York have a highly centralized system. In the former state the work is performed by forty-one income-tax assessors, selected according to merit principles, and assigned to that number of districts, where their work is done under the direction and supervision of the state tax commission. A large portion of the proceeds collected by these state officials is returned to the counties and other local government districts. Similar methods prevail in New York and Massachusetts.¹ Other state revenues are paid directly to the state officers authorized by law to receive them; but these revenues do not always go directly into the state treasury, for in some states the fees that are collected by the insurance commissioner or by the secretary of state, for example, are used to pay the expenses of the offices collecting them, and only the surplus, if any, is paid into the treasury.

CHAP.
XL

The state treasurer and the state auditor or comptroller² are responsible for the safe-keeping and legal disbursement of the greater portion of the state funds. In about a dozen states these funds are kept in the state's own vaults, and consequently no interest is derived from them. In the great majority of states, however, certain banks, located in different parts of the state, are designated as depositories of state funds; and all but four of these states receive interest on the state money deposited in such institutions.³

Custody of
state funds

From the varied sources of income described in the preceding pages the states received, in 1926, the aggregate amount of \$1,655,-494,919. It is next in order to indicate, in very general terms, the objects for which this sum was expended. In the reports of

State ex-
penditures

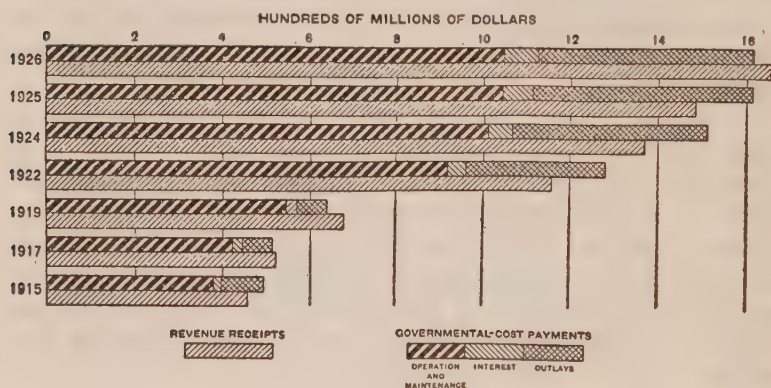
¹ Wisconsin, New York, and Massachusetts are the only states which share the proceeds of the income tax with local government units. In the other eight states having income taxes the receipts are used exclusively for state purposes. The same use is made of the proceeds of the inheritance taxes in thirty-seven states, while eight states share the receipts with local government units. In Nebraska the levy and spending of inheritance taxes belong to the counties. Bureau of the Census, *Wealth, Public Debt, and Taxation: 1922*, "Taxes Collected," 10; *Report of the [New York] Special Joint Committee on Taxation and Retrenchment—Taxation Section (1921)*, 23-47.

² See p. 750.

³ In 1919 the Illinois legislature passed a law providing for the selection of state depositories on a basis of competitive bids, for a full accounting of all interest earnings on state funds, and for giving publicity to all matters connected with the handling of state funds. *Laws of Illinois*, 1919, p. 954. See F. P. Gruenberg, "Interest on Public Deposits," *Annals of Amer. Acad. of Polit. and Soc. Sci.*, CXIII, 147-155 (May, 1924); M. L. Faust, *The Custody of State Funds* (New York, 1925).

the Bureau of the Census, state expenditures are grouped in three main divisions. (1) Interest payments on state debt amounted to \$76,869,095, or 4.8 per cent of the total state expenditure. (2) Payments for outlays came to \$488,358,061, or 30.2 per cent of the total; these include amounts paid for the acquisition and construction of more or less permanent properties and public improvements, and for additions made to those previously acquired. But far in excess of these two items were (3) state expenses, or the payments for operation and maintenance of the general departments of the state government and of public service enterprise;

REVENUE RECEIPTS AND GOVERNMENTAL-COST PAYMENTS OF
THE 48 STATES FOR SPECIFIED YEARS: 1915-1926



Reproduced, by permission, from the Bureau of the Census, *Financial Statistics of States*, 1926.

together, these came to \$1,040,234,452, or 65 per cent of the total. Here one finds \$86,870,713 for the expenses of the legislative, executive, and judicial branches of the state government; \$59,746,950 for protection of person and property; \$62,696,258 for the development and conservation of natural resources; \$25,549,229 for health and sanitation; \$156,639,057 for highways; \$178,579,562 for charities, hospitals, and correctional institutions; \$413,074,268 for schools; \$2,207,988 for libraries, \$3,541,545 for recreation; \$51,328,882 for miscellaneous purposes; and in addition to these totals for all the states, fifteen states reported additional expenditures for the operation and maintenance of public service enterprises, amounting to \$9,076,346.¹ The accompanying diagrams will show the per capita and also the per cent distribution of payments

¹ See p. 775.

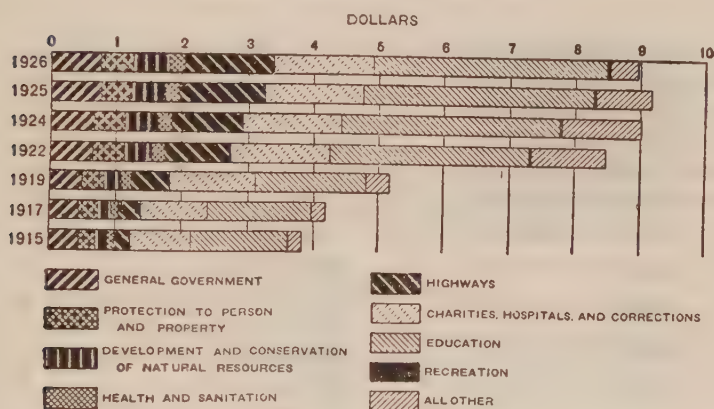
in recent years for the foregoing objects. The total expenditures were less than the total revenue receipts by \$40,956,965.¹

Having seen the diverse ways in which state funds are obtained and the chief objects of state expenditure, we are brought to the point where a long-neglected, but exceedingly important, phase of the state financial system must be considered, namely, the methods by which money is allocated to, and expended by, the various officers, boards, commissions, and institutions.

CHAP.
XL

Appropriations and expenditures present many special problems

PER CAPITA PAYMENTS FOR OPERATION AND MAINTENANCE OF
GENERAL DEPARTMENTS OF THE 48 STATES FOR
SPECIFIED YEARS: 1915-1926



The total per capita payments for operation and maintenance other than those for public service enterprises increased from \$3.85 in 1915 to \$8.98 in 1926, or 133.2 per cent.

Reproduced, by permission, from the Bureau of the Census, *Financial Statistics of States*, 1926.

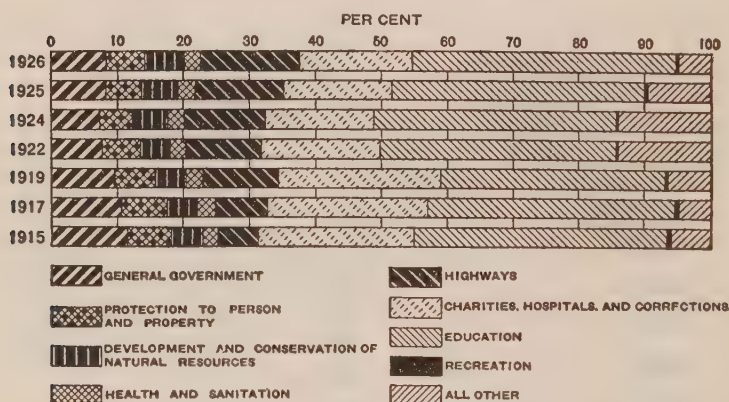
Under conditions which prevailed in practically every state prior to 1913, and have not yet been entirely changed, it has been impossible either to make comprehensive plans for the distribution of public revenues among the several administrative activities or to control, in any strict and effective way, the use of state money or property. Every state officer has naturally magnified the importance of his own work and has seen unlimited opportunities for new services to be rendered. Inevitably he has sought increased departmental appropriations. With almost unlimited demands pouring in from a hundred or more agencies and insti-

Haphazard appropriation methods before 1913

¹ See A. F. MacDonald, "The Trend in Recent State Expenditures," *Annals Amer. Acad. Polit. and Soc. Sci.*, CXIII, 8-14 (May, 1924); C. Heer, *The Post-War Expansion of State Expenditures* (New York, 1926).

tutions, and with no method of balancing claims upon the treasury one against another and of distributing appropriations on the basis of a full consideration of the interest and requirements of the state, unseemly scrambles for funds regularly took place whenever the legislature came into session. The departmental and institutional estimates were either merely "compiled" by some state officer, such as the treasurer or auditor, and transmitted by him to the legislature, or presented directly to the appropriation com-

PER CENT DISTRIBUTION OF PAYMENTS FOR OPERATION AND
MAINTENANCE OF GENERAL DEPARTMENTS OF THE
48 STATES FOR SPECIFIED YEARS: 1915-1926



Reproduced, by permission, from the Bureau of the Census, *Financial Statistics of States*, 1926.

mittees by the head of each state office or institution. No administrative officer acquainted with the entire business of the state reviewed these estimates, compared them, cut them down to agreed necessities, measured them against estimated revenues, and laid a carefully worked out and balanced financial program before the legislature.

Furthermore, each member of the legislature was at liberty to introduce as many bills as he chose carrying charges upon the state treasury. From day to day special appropriation bills would be passed by the legislature, with no responsible officer keeping tally or measuring their merits against the total expenditures and the estimated revenues of the state. One or two "general appropriation bills" providing for the support of the principal state offices or institutions, and sometimes containing thousands of items, would be made up by the appropriation committees of the house and sen-

ate. Rarely would these bills be brought out on the floor of the legislature for public discussion and criticism before the last few crowded days of the session;¹ and after a few hours devoted to rather perfunctory and ineffective criticism, they would be passed substantially as reported by the appropriation committees. Before or after the general appropriation bills had been disposed of, a large number of petty appropriation bills, carrying a considerable sum in the aggregate, would be rushed through with little scrutiny and usually without debate.² Proposals to spend money came forward every year by the thousand, and their chance of adoption was not in proportion to their merits, but rather to the political influences behind them. When the legislature adjourned, no one knew definitely how much money had been appropriated.

In most states the governor could veto separate items; hence it became a common practice to combine essential and doubtful appropriations in a single item, in order to prevent a veto. Without knowing what the total authorized expenditures for the next fiscal period would amount to when the governor had finished vetoing bills and items, the legislature would pass the revenue bills which, in the meantime, had been prepared by other committees with little or no close relation to the work of the committees in charge of appropriations. Naturally, neither the governor nor the legislature could be held to a proper degree of accountability by the citizens of the state who had to foot the bills; and executive departments were often granted more money for the performance of their functions than the nominal head of the state government deemed necessary. With the initiative in matters of appropriation largely in the hands of several legislative committees—each considering separately and without adequate publicity a particular field of expenditure, and each subject to pressure of local interests and log-rolling methods—waste, extravagance, and deficits were inevitable.

Relief from these conditions became imperative as the cost of

¹ During the last two weeks of the Pennsylvania legislature of 1919, 434 appropriation bills were passed, aggregating \$88,000,000.

² The Illinois legislature passed 94 appropriation bills in 1913 and 88 in 1915, some of them containing hundreds of items. The majority were not reported from committees or passed until near the close of the session, when adequate consideration was impossible. In 1915 the discussion of the "omnibus appropriation" bills in the senate, carrying \$15,000,000, occupied only nine lines in the printed report of debates. The New York legislatures between 1916 and 1919 inclusive, passed 39, 81, 89, and 87 appropriation bills, respectively. *Report of N. Y. Reconstruction Commission* (1919), 3-10, 312. In the Pennsylvania legislature of 1921 over 600 petty appropriation bills were introduced; 450 of these passed and received the governor's approval. See L. P. Fox, *Pennsylvania's Appropriation Methods* (1922), 26-36.

government mounted, and it has been found, in greater or lesser degree, in the various plans of budgetary procedure which have been introduced in all the states since Wisconsin set the example in 1911.¹ Hardly any two of these plans are alike in detail; and there are some differences in fundamentals. The most important point of variation is the budget-making agency, in other words, the location of responsibility for the initiation of the budget or program of expenditures. On this basis the systems fall into three fairly distinct classes:²

(1) Under the system adopted in Arkansas, in 1913, the budget is prepared and submitted to the legislature by a legislative committee; and a similar system was in use in New York between 1916 and 1921. In New York, at least, this arrangement resulted in no very marked improvement upon conditions prevailing previously.³

(2) Fourteen states⁴ have laws providing for budgetary boards or commissions, generally consisting of the governor and one or two other executive officers and a few members of the legislature, or made up solely of the principal executive officers. In

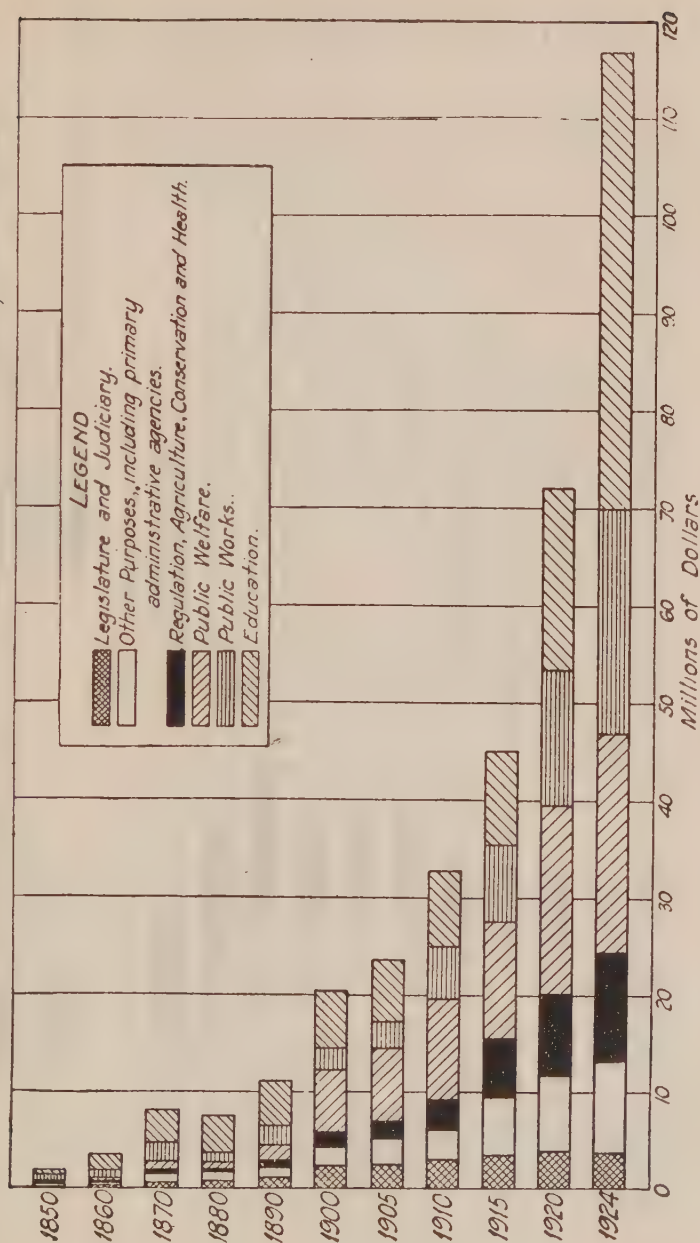
¹The movement for state budgetary reform is summarized in *Municipal Research*, No. 91 (1917), including bibliography; A. E. Buck, "The Present Status of the Executive Budget in the State Governments," *Nat. Mun. Rev.*, VIII, 422-435 (Aug., 1919); *ibid.*, "State Budget Progress," *Nat. Mun. Rev.*, X, 568-573 (Nov., 1921). R. Montgomery, "Budgetary Legislation in 1921," *Amer. Polit. Sci. Rev.*, XVI, 73-78 (Feb., 1922); "Budgetary Legislation in 1922," *ibid.*, XVII, 82-85 (Feb., 1923); "Budgetary Legislation of 1923," *ibid.*, XVIII, 102-106 (Feb., 1924); A. E. Buck, "Progress in State Budget-Making," *Nat. Mun. Rev.*, XIII, 19-25 (Jan., 1924); *ibid.*, "The Development of the Budget Idea in the United States," *Annals of Amer. Acad. of Polit. and Soc. Sci.*, CXIII, 31-39 (May, 1924).

²The different budgetary laws down to 1919 and 1922, respectively, are analyzed in *Report of N. Y. Reconstruction Commission* (1919), Part IV; and L. P. Fox, *Pennsylvania's Appropriation Methods and Budget Systems in the State* (1922).

³In 1921 the New York legislature created a state board of estimate and control to be the budget-making authority. This board consisted of the governor, the chairman of the assembly ways and means committee and of the senate finance committee, and the state comptroller. Nevertheless the legislative budget committee continued to function; requests for appropriations were addressed by the departments to both the new board and the old legislative committee, and both bodies compiled from them their estimates of necessary appropriations. In 1927 this system was superseded by the executive budget method. See p. 796; also *Amer. Pol. Sci. Rev.*, XVI, 76 (Feb., 1922); *Report of N. Y. Reconstruction Commission* (1919), 3-10, 310-319; *Municipal Research*, No. 86 (1917), "The New York State Legislative Budget for 1917"; *ibid.*, No. 72 (1916), "History of Appropriations in the [N. Y.] Legislative Session of 1916."

⁴Alabama (1919), Connecticut (1916), Florida (1921), Georgia, Kentucky (1918), Louisiana (1916), Maine (1919), Michigan (1921), Montana (1916), North Dakota (1915), Oregon (1913-21), Texas (1919), and Wisconsin (1911). Missouri adopted an executive budget system in 1921, but it was rejected in a popular referendum in 1922. The budget is now prepared by the state tax commission.

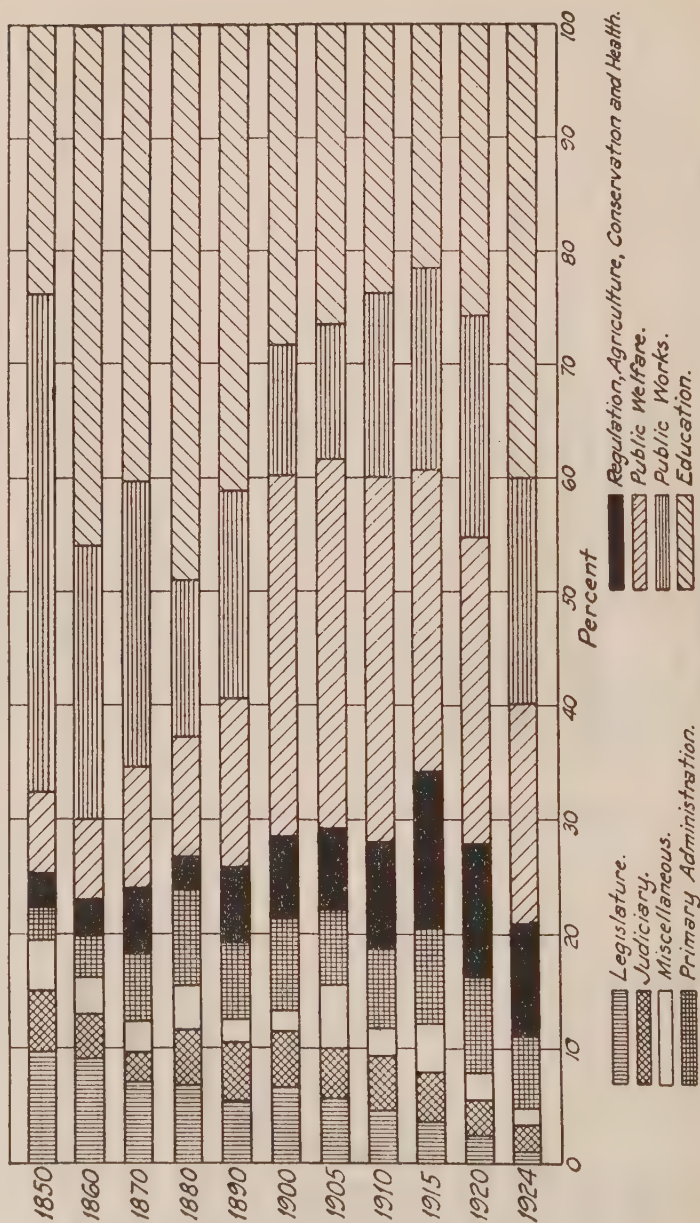
OPERATING EXPENDITURES OF NEW YORK STATE GOVERNMENT, 1850 TO 1924



Reproduced, by permission, from the Report of the Committee on Taxation and Retrenchment, February 11, 1926.

CHAP.
XL

OPERATING EXPENDITURES OF NEW YORK STATE GOVERNMENT, 1850 TO 1925, SHOWING DIVISION
ON 100 PER CENT BARS ACCORDING TO MAJOR FUNCTIONAL GROUPS



Reproduced, by permission, from the Report of the Committee on Taxation and Retrenchment, February 11, 1926.

Michigan, for example, responsibility for the budget has been placed upon the state administrative board consisting of the governor, secretary of state, auditor-general, treasurer, attorney-general, highway commissioner, and superintendent of public instruction. On the other hand, in Texas and Louisiana budget matters are handled by the board of control and the tax commission, respectively, each of which consists of three persons appointed by the governor for overlapping terms. In nearly all states having a budget board or commission the governor is a member, or is in a position to exert some influence over the board through his appointees.

CHAP.
XL

(3) The remaining thirty-three states have preferred what is called the executive type of budget, in which the governor is made more directly responsible for the formulation of the program of state expenditures.¹ The best-known systems in this class are those of Maryland, adopted by constitutional amendment in 1916, and Virginia, enacted by the legislature in 1918.² These two systems are broadly alike, yet with the important difference that Maryland has placed strict limitations upon the power of the legislature to increase the amount of appropriations recommended by the governor and to pass supplementary and special appropriation bills; while Virginia has not done so. In Maryland the legislature cannot, for example, amend the budget bill to change the school fund, or salaries and obligations required by the constitution. It may increase or decrease the items relating to the expenses of the legislature, or increase those relating to the judiciary; but it can only reduce or strike out other items.

The
executive
budget in
Maryland
and
Virginia

Although differing greatly in the means and methods employed, all state budgetary plans have as their main object the centralization of responsibility for the proposal of state expenditures, with a view to a reduction of the cost of operating the various branches of the government.³ It is everywhere coming to be recognized that

How
budgetary
reform
tends to
check
waste

¹ New Hampshire, Rhode Island, and South Carolina are included in this third group, although their budgetary plans contain important variations from the true type of executive budget.

² California, Louisiana, Maryland, Massachusetts, Nebraska, New York, and West Virginia are the only states which have written budgetary provisions into their constitution. On the Maryland and Virginia systems see A. E. Buck, "Operation of the Maryland Budget," *Amer. Polit. Sci. Rev.*, XII, 514-521 (Aug. 1918), and "The First Virginia Budget," *Nat. Mun. Rev.*, IX, 207-209 (Apr., 1920).

³ A. E. Buck, "The Budget in the Model State Constitution," *Nat. Mun. Rev.*, X, 382-385 (July, 1921); National Municipal League, *A Model State Constitution* (1921), §§ 49-51; pp. 31-35.

sound principles of budget-making are a most effective means of avoiding waste of public money, and, at the same time, of securing better service in public administration. A budgetary system which embodies simple and clear methods of stating the uses to which public funds are devoted also enables the voters and taxpayers more easily to grasp the relative importance of each group of expenses, and to know where the public money goes, what proportion is devoted to each state activity, and exactly what use is made of the appropriations granted to each of the state offices, boards, commissions, and institutions.

To be most effective in these directions, a budgetary system should embrace at least the following features. (1) Each state department, office, or institution should be required to submit to a central budget-making agency, two or three months before the meeting of the legislature, an estimate of its financial needs for the ensuing fiscal period, upon uniform sheets having items arranged in accordance with some uniform system of classification. (2) The central budget-making agency should then make a careful review, revision, and compilation of the estimates thus submitted; and to aid it in this work, it should be given a staff to conduct investigations and make reports. (3) At some time within the first few days of the legislative session this budget-making agency should submit to the legislature a detailed financial statement, called the budget, which is simply another name for a comprehensive program of recommended expenditures and estimated revenues, arranged by departments and functions, and compared item by item with past expenditures and revenues. This should be accompanied by a balance sheet, a debt statement, and a statement of the financial condition of the state for each year covered by the budget. (4) All of the appropriations provided for in the budget should be consolidated in a single appropriation bill; unless, as in a number of states, the constitution requires that appropriation bills for salaries of state officers shall not include other items of expenditure. (5) The legislative committees should forthwith proceed to a consideration of the budget proposals, and should promptly report their appropriation bills in ample time to allow full debate, criticism, and amendment; and the bills should be passed well before the close of the session.¹ (6) No supplementary or special

¹One of the most radical changes in legislative financial procedure was made in New York in 1917, when the general appropriation bill was completed and introduced by the middle of March, left open to all the members

appropriation bills should be enacted until after the final passage of the budget bills; and in all such cases a two-thirds or three-fourths vote might well be required.

CHAP.
XL

Ancillary
reforms

Most students of state government are agreed that the executive type of budget is far better calculated to achieve the desired economy in state administration than any of the other systems mentioned above. Nevertheless, to be thoroughly effective, any budgetary system must be accompanied by at least four other reforms: (a) the overhauling and reconstruction of the state administrative machinery, as explained in the preceding chapter; there can be no real executive responsibility for state expenditures until executive responsibility is established for the whole administrative system; (b) an alteration in legislative methods of handling appropriation and revenue measures—not only a closer coöperation between the budget-making agency and the leaders in the legislature, but also changes whereby appropriation measures in particular, instead of being parcelled out among several committees,¹ shall be considered by a single committee in each house or, preferably, by a joint committee of the two houses; (c) granting to the governor the right both to veto and to reduce single items in appropriation bills in order to overcome the seemingly irresistible tendency on the part of legislatures to spend money more freely than is needed; and (d) the introduction of modern business methods in the purchase of services and supplies, the adoption of standardized and uniform accounting systems for all departments, and the installation of improved methods of auditing and controlling expenditures.² To a sound system of state finance, on the side of appropriations and disbursements, the clearing of the administrative jungle described in the preceding chapter is absolutely indispensable. As long as the state government includes a score or more of independent and uncontrolled offices, boards, and commissions, no adequate budgetary arrangements are possible. It is true that budgetary reform has gone forward rapidly in the past few years without waiting for the slower-moving pro-

for inspection for two weeks, amended in open session on the floor, and advanced to final passage only after opportunity had been given for criticism. *Municipal Research*, No. 86 (1917).

¹In Ohio, in 1919, independent action by six different committees on appropriations and revenue, and the archaic and unbusiness-like procedure of the legislature, destroyed the budget plan of the governor. B. E. Arthur, in *Nat. Mun. Rev.*, IX, 279-288 (May, 1920).

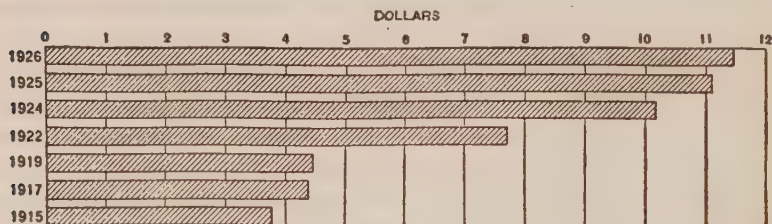
²See *Municipal Research*, No. 74 (1916), "The Accounting and Reporting Methods of the State of New York."

cesses of administrative consolidation to prepare the way; and improved budgetary methods have been introduced in many states where practically nothing has been accomplished in the way of administrative reorganization. It is not to be expected, however, that under such circumstances the resulting economies will measure up to those which have appeared where administrative consolidation and budgetary reform have been undertaken conjointly.

State debts

A final phase of state finance which requires a word of comment is borrowing and indebtedness. Unlike the national government, whose borrowing power is unlimited, all but three state governments¹ are restricted in this matter by constitutional pro-

PER CAPITA NET DEBT, AT THE CLOSE OF THE YEAR, OF THE
48 STATES FOR SPECIFIED YEARS: 1915-1926



Reproduced, by permission, from the Bureau of the Census, *Financial Statistics of States*, 1926.

visions² designed to prevent a recurrence of the reckless piling up of debts which marked the careers of state legislatures before the Civil War and during the Reconstruction period. Nevertheless, practically every state is now in debt, and the aggregate of these state debts has been almost quadrupled in the past twenty years. In 1902 the total net debt of the states amounted to \$234,965,000; in 1912, it was \$345,942,000; and by 1922 it had risen to \$935,544,000—an increase of 170 per cent in ten years. In 1926 it had mounted to \$1,327,514,422, an increase over the preceding year of \$78,713,215. A large part of this startling increase has been due to bond issues for roads and for soldiers' bonuses.³ Reduced to a per capita basis, state indebtedness rose from \$2.99 in 1902, to \$3.57 in 1912, and jumped to \$7.70 in 1922, and to \$11.46 in 1926. Growth of indebtedness, however, has not taken place in all the states; between

¹ Vermont, New Hampshire, and Connecticut. Until 1918, Massachusetts also had no constitutional debt limit.

² See pp. 697-699.

³ C. Kettleborough, "Soldiers' Bonus," *Amer. Polit. Sci. Rev.*, XVI, 455-460 (Aug., 1922).

1912 and 1922, eight actually reduced their net debt.¹ The largest decrease appeared in Massachusetts (\$2,555,000), the state which had the largest debt of all in 1912.²

States borrow money, ordinarily, by issuing interest-bearing bonds running for a period of from ten to fifty years. These may take the form of either sinking-fund issues or serial issues, the two differing principally in the method provided for payment. Under the sinking-fund system all of the bonds of a given issue mature at

CHAP.
XL

Bond
issues

¹ Massachusetts, Connecticut, Wisconsin, Kansas, Virginia, Georgia, Oklahoma, and Arizona.

² Bureau of the Census, *Wealth, Public Debt, and Taxation: 1922*, "Public Debt," 7, 10-17. The following table shows the amount of net and per capita indebtedness of the five states having the highest, and the lowest, amounts, respectively, in 1926:

States with Highest Net Debt.

	<i>Amount.</i>	<i>Per capita.</i>
New York	\$222,554,217	\$19.81
Illinois	138,633,018	19.39
North Carolina	119,162,556	42.03
California	100,389,995	23.63
Pennsylvania	83,710,906	8.78

States with Lowest Net Debt.

	<i>Amount.</i>	<i>Per capita.</i>
Arizona		
Nebraska		
Florida	\$ 90,575	\$00.07
Nevada	1,292,131	16.69
Indiana	1,689,000	.54

States with Highest Per Capita Net Debt.

	<i>Per capita.</i>	<i>Amount.</i>
Oregon	\$43.61	\$ 38,110,862
North Carolina	42.03	119,162,556
Delaware	34.33	8,205,640
West Virginia	28.85	47,724,866
South Dakota	25.07	17,172,216

States with Lowest Per Capita Net Debt.

	<i>Per capita.</i>	<i>Amount.</i>
Arizona		
Nebraska		
Florida	\$00.07	\$ 90,575
Indiana	.54	1,689,000
Wisconsin	.62	1,763,700

See Bureau of the Census, *Financial Statistics of States* (1926); "The Debt of the State of New York, Past, Present, and Future," *Report of the Special Joint Commission on Taxation* (Mar., 1926); R. Turner, "Repudiation of Debts by the States of the Union," *Curr. Hist.*, XXIII, 475-483 (Jan., 1926).

one time, and a definite sum is set aside each year from current revenues to meet the principal and interest. Serial bonds, on the other hand, mature in instalments or series, thus enabling a definite proportion of a given debt to be extinguished every year, or at other stated intervals, by payments from current revenues which, under the other system, would go into the sinking-fund. Serial bond issues have rapidly grown in popular favor in the past two decades and seem destined to supplant the earlier sinking-fund system.

REFERENCES

- A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), I, 693-694; II, 3-5; III, 494-506.
- National Industrial Conference Board, *Cost of Government in the United States* (New York, 1926).
- C. C. Plehn, *Public Finance* (6th ed., New York, 1926).
- , *Digest of State Laws Relating to Taxation and Revenue* (Washington, 1922).
- H. L. Lutz, *Public Finance* (New York, 1925), Chaps. XIV-XXIII, XXIX-XXX.
- M. H. Hunter, *Outlines of Public Finance* (rev. ed., New York, 1926), Chaps. IX-XXIII.
- American Year Book* (1925), pp. 310-317, 329-349; *ibid.* (1926), pp. 322-350.
- H. M. Rocca, *Taxation: An Introductory Study* (Pamphlet, Washington, 1927).
- Report of the [New York] Reconstruction Commission on Retrenchment and Reorganization* (Albany, 1919).
- Reports of the [New York] Joint Special Committee on Taxation and Retrenchment* (Albany, 1921-1927).
- Annals of Amer. Acad. of Polit. and Soc. Sci.*, LVIII, 1-275 (Mar., 1915), series of articles on "Readjustments in Taxation;" *ibid.*, CXIII, 69-130 (May, 1924), series on "Fiscal Control and Competency in the Public Service;" *ibid.*, CXIII, 269-305 (May, 1924), series on "Competency and Economy in Purchasing."
- F. A. Cleveland and A. E. Buck, *The Budget and Responsible Government* (New York, 1920).
- A. E. Buck, *Budget-Making* (New York, 1921).
- W. F. Willoughby, *The Movement for Budgetary Reform in the States* (New York, 1918).
- F. F. Blachly, "The Executive Budget in the Light of Oklahoma's Experience," *Southwestern Polit. Sci. Quar.*, II, 21-39 (June, 1921).
- R. H. Wells, "The Item Veto and State Budget Reform," *Amer. Polit. Sci. Rev.*, XVIII, 782-791 (Nov., 1924).
- F. B. Garver, *The Subvention in the State Finances of Pennsylvania* (Menasha, Wis., 1919).
- E. H. Maling, "Financial Administration of the Commonwealth of Massachusetts," *Annals of Amer. Acad. of Polit. and Soc. Sci.*, LXII, 101-112 (Nov., 1915).
- L. H. Gulick, *Evolution of the Budget in Massachusetts* (New York, 1920).

- Mass. Const. Conv. Bull.*, No. 21, "Methods of Public Borrowing" (Boston 1917). CHAP.
XL
- E. T. Miller, "State Tax Reform and the Farmer," *Southwestern Polit. Sci. Quar.*, II, 152-161 (Sept., 1921); "State Income and Taxation," *ibid.*, IV, 36-48 (June, 1923).
- J. F. Pyle, "The Taxation of Incomes in Oklahoma," *Jour. Polit. Econ.*, XXX, 709-716 (Oct., 1922).
- H. A. Barth, *Financial Control in the States* (Philadelphia, 1923).

CHAPTER XLI

THE STATE JUDICIARY

Three important functions of the judiciary

The last, and in some respects the most important, of the three coördinate branches of state government remains to be considered, namely, the judiciary. The state courts perform three very important functions: first, they provide an agency for the settlement of the estates of deceased persons, and an orderly method of adjusting disputes between individuals and between individuals and state or local governments; second, they constitute the sole instrumentality in time of peace for determining the guilt or innocence of persons accused of violating the criminal laws of the state; and third, they serve as the guardian of the constitutional rights of the citizen against infringement by the state government, and prevent the three departments of government from overstepping the boundaries marked out for each of them by the constitution. In not a few states certain non-judicial duties of an administrative nature have also been imposed upon the judiciary, especially in connection with elections, the management of certain county affairs, the appointment of school boards, and the granting of certain licenses.¹

Furthermore, although the fact is unappreciated by the general public, the state, and especially the federal, courts have increasingly become the managers of important businesses. Through their right to appoint receivers to take charge of and manage property, pending litigation, for the benefit of the owners, stockholders, or creditors, our courts are finding themselves indirectly engaged in the operation of railways, municipal transportation systems, mines, factories, and various other business enterprises; and in so doing they are required to pass upon questions of business administration, service, and personnel, supervise accounts, authorize bond issues and sales of property, and intervene in controversies with employers and labor unions over wages and working conditions. "They are as truly the business managers of the properties or

¹ The extent to which such administrative duties may be imposed upon the judiciary is limited in an indefinite way by the doctrine of separation of powers. The highest courts are commonly held to be exempt. But the inferior courts are often assigned work of this character.

enterprises which they are judicially guarding, as if the judges bore the title of president or superintendent.”¹

CHAP.
XLI

For the performance of these varied functions every state has a more or less elaborate system of courts, some of which are created by the state constitution and have their jurisdiction defined with great particularity therein, while others are established and regulated only by act of the legislature.² Although in no two states is the system precisely the same, there is yet a considerable degree of uniformity, and a general description will hold true except in matters of detail.

The system
of state
courts

The lowest courts are those held by justices of the peace, who are almost always men devoid of legal training, although now and then one hears of a lawyer serving in this capacity. As a rule, these justices are chosen by popular vote in townships or other subdivisions of the county; in three New England states, however, and in about an equal number of southern states, they are appointed by the governor. The jurisdiction of the justices usually extends throughout an entire county, and includes both petty civil and criminal cases. In Illinois, for example, their jurisdiction includes civil cases in which the amount involved does not exceed three hundred dollars and criminal cases which are punishable by fines not exceeding the same amount. Practically everywhere the justices may also issue warrants for the arrest of persons charged with criminal offenses, and may conduct preliminary examinations of persons accused of felonies; and, if the evidence seems to warrant, they may “bind over” such persons to await the action of the grand jury.³

1. Justices
of the
peace

Jurisdic-
tion

¹ W. MacDonald, *A New Constitution for a New America*, 192.

² Certain quasi-judicial powers are also exercised by state administrative boards, such as public utility and railway commissions, civil service commissions, and tax commissions.

³ The importance of these preliminary hearings and the courts conducting them is emphasized by the New York Crime Commission in a survey of felonies prosecuted in that state in 1925. One of the conclusions reached was that “the courts which actually count most in our system are not those highly respected and awesome tribunals where begowned justices or appeals supreme court justices sit, nor yet the county courts, where, throughout the land, criminal trials attract the interest of the newspaper-reading public, but the humble courts of the police magistrate and justices of the peace. Here, where justice usually sits in an atmosphere of disorder and inefficiency, and in the presence of a motley assemblage of the unfortunate, the rapacious, and the curious, most felony cases are passed upon and thrown out. If, as is usually understood, this court is a place for ‘sifting’ cases, throwing out the unimportant and unproved, and thus saving the time and energy of the trial court and the grand jury, it is hardly a satisfactory plan for real ‘sifting.’ If such preliminary work is not well done and habitual criminals are turned loose to return to their trade, new and serious crimes are the penalty society pays for slipshod preliminary examinations. Moreover, this court is the court which touches the

Justices may also solemnize marriages, administer oaths, and take the acknowledgment of many legal instruments. In contrast with practically all the other state and local courts, the justice courts have no clerks; no permanent official record is kept of their proceedings; and they have no official seal. They are, therefore, not "courts of record," as are the others. Furthermore, they may render a final decision in only the most petty misdemeanors and civil cases; in all other cases appeal lies to the next higher courts.¹

As might be expected from their lack of special training for judicial work, the justice which these officials administer is of a rough and ready, more or less informal, type. In the early history of the country, when means of travel to the county seat (where the higher courts dispensed justice at infrequent intervals) were difficult and time-consuming, the rural justices of the peace performed very useful functions as tribunals near at hand for the adjustment of minor differences between members of the same community. With the greatly improved means of travel and communication existing today in nearly all parts of the country, it may well be doubted whether the office of justice of the peace deserves to be continued.² In some localities, at any rate, the administration of it has been characterized by chicanery and extortion, and in some cities the office has been abolished entirely.³

In incorporated villages and towns it is common to find police magistrates with jurisdiction similar to that of the justices of the peace, but restricted to cases arising within the limits of the incor-

masses of the people. It is the people's court and if it functions badly a deep distrust of all justice is likely to result. As Charles Evans Hughes once said, 'justice in the minor courts, effectively and wisely administered, is the best protection for the safety of our institutions.' J. Knight, "Difficulties In Enforcing Criminal Law," *Curr. Hist.*, XXVII, 320-325 (Dec., 1927). See also H. Harley, "The Need for a Criminal Court," and "Efficient Local Courts," *Jour. Amer. Judic. Soc.*, III, 6-16 (June, 1919); "Remedy Proposed for Justices Courts," *ibid.*, XI, 30-31 (June, 1927).

¹ In Arkansas, Kentucky, and Tennessee the justices of the peace of each county constitute the county court, which acts as the principal administrative board for county affairs. In New York, Michigan, and Illinois justices of the peace act as members of the "town board" in their respective townships.

² In Iowa, where justices of the peace are elected by townships, less than half of the townships (408 out of 859) in the 53 counties from which reports were obtained in 1923, took the trouble to elect these officials. Although these townships were entitled to 1,719 justices, only 631 were elected, and many who were elected never qualified. See W. L. Wallace, "Constables and J. P.'s in Iowa," *Nat. Mun. Rev.*, XIII, 7-10 (Jan., 1924).

³ In Chicago, for example, the practices of the justices of the peace became so intolerable that the office was abolished when the present municipal court was created in 1905. See *Ill. Const. Conv. Bull.*, No. 10 (1920), "The Judicial Department," 762 ff.; C. H. Smith, "The Justice of the Peace System in the United States," *California Law Rev.*, XV, 118-145 (Jan., 1927).

porated area. In small cities provision is also made by law for special municipal or city courts, which are often called police courts. In the largest cities there is a somewhat intricate system of courts of first instance with both civil and criminal jurisdiction,¹ and in such places it is not unusual to find, as in Chicago, that the office and jurisdiction of the justice of the peace have disappeared within the city limits.

A county court is held at least once a year in practically every county in the country. In some states this court is called the court of common pleas, and in others the district, circuit, or superior court. Sometimes there is a single judge of the county court for each county, as in Illinois; but in other states it is not unusual to find two or more counties combined in a judicial circuit or district in which there are one, two, or even three circuit or district judges who, at stated intervals, hold a session of the county court in each county comprised in the circuit or district. On the other hand, in populous counties, one finds county, superior, or circuit courts with numerous judges of equal rank and jurisdiction.² The term of judges of the county court is rarely longer than four years; and in more than three-fourths of the states these judges are chosen by popular vote.

2. County
courts

County courts almost invariably have original jurisdiction over all criminal cases, and generally also final jurisdiction in such cases in so far as questions of fact are concerned, although disputed questions of law may be carried on appeal to one or more of the higher courts. In the county court, also, persons accused of crimes and bound over by a justice of the peace to await the action of the grand jury usually have their guilt or innocence determined. In civil cases the county court usually has unlimited jurisdiction, although in some states it is restricted to cases involving less than a stated amount. Its jurisdiction in civil cases is both original and appellate. The great majority of cases coming before it, however, are commenced in it; cases in which it has appellate jurisdiction are brought to it on appeal from decisions of justices of the peace or municipal courts. In some states the judge of the county court also acts as probate judge in the settlement of the estates of

Jurisdic-
tion

¹ See Chap. XLVIII. The results following the recent reorganization of the criminal courts in Detroit are described in "Cleaning Up Detroit," *Jour. Amer. Jud. Soc.*, IV, 38-44 (Aug., 1920).

² For example, in San Francisco county there are 16, and in Los Angeles county 38, superior court judges. In Cook county, Illinois, there are 48 circuit and superior court judges with almost identical jurisdiction. Cf. H. Harley, "A Model County Court," *California Law Rev.*, III, 1-13 (Nov., 1914).

deceased persons and in passing upon matters relating to the property, custody, and welfare of minor children and other persons under guardianship. In the most populous counties, however, a separate probate, surrogate, or orphan's court usually attends to such matters.¹ In several states, too, the county court has important administrative duties in connection with the enforcement of certain state laws or with some phases of county government.

The highest state court is almost always called the supreme court, although in New York it is called the court of appeals, and in New Jersey the court of errors and appeals; in both of these states there is a "supreme" court, but it is inferior to the courts just mentioned.² Usually the supreme court consists of from five to nine judges, who, as a rule, sit together in the hearing of cases, although in a few states the court is authorized to sit in sections. In any event, a majority of the whole number of members of the court or section must concur in any decision rendered.³ The judges are usually elected, being chosen either on a general ticket or by districts; although under a third method candidates are nominated from different districts and voted for by the voters of the entire state. The term of office ranges all the way from life or during good behavior in Massachusetts, New Hampshire, and Rhode Island, and from twenty-one and fourteen years in Pennsylvania and New York, respectively, to two years in Vermont. In the last-mentioned state, however, it is customary for the legislature to reelect a sitting judge as long as he is willing or physically able to serve. Six-year terms are the most common, being found in seventeen states.

The work of the supreme court is almost wholly confined to hearing and deciding appeals upon questions of law which come up from the lower trial courts, although in a few special cases proceedings may be begun in the supreme court. The constitutions

¹ In some New England states there are no county judges, but the several judges of the superior (or supreme) court hold court in the different counties throughout the state, in addition to serving collectively as an appellate court. There are also special probate districts in each of which there is an elective probate judge.

² The State of Georgia had no supreme or other court for the correction of errors from 1776 to 1846. See J. P. Lamar, "History of the Establishment of the Supreme Court of Georgia," *Amer. Bar Assoc. Jour.*, X, 513-518 (July, 1924).

³ The decisions of the supreme court and, in some states, of the next inferior court also, are published regularly in volumes known as *Illinois Reports*, *Indiana Reports*, etc. The publication takes place under the editorial supervision of a reporter of decisions appointed by the court. See O. N. Carter, "Methods of Work in Courts of Review," *Ill. Law Rev.*, XII, 231-259 (Nov., 1917).

or statutes of nine states also authorize the governor or the legislature, or both, to require the opinion of the supreme court judges upon important questions relating to the construction and constitutionality of existing or proposed legislation.¹ Ordinarily, however, the supreme court of a state, like the highest federal court, will express an opinion upon such matters only when the questions come before it in the ordinary course of litigation.²

Between the highest court and the trial or county courts, about one-third of the most populous states have established one or more intermediate courts, called superior, circuit, or appellate courts, whose judges are usually elected from a few large judicial districts into which the state is divided for this purpose. These intermediate courts may have original or appellate jurisdiction, or both. The cases in which they have original jurisdiction are often determined by act of the legislature and usually include, among others, contested election cases and civil cases involving large sums of money. As appellate courts, they hear appeals from the county or other inferior courts, and are often empowered to render final decisions in such cases in order to relieve the congestion of business before the supreme court.³

All of the state courts which have been described exist quite independently of the system of federal courts established by the national constitution and by acts of Congress; there is no foundation whatever for the common notion that the highest state court is subordinate to the lowest federal court. Certain classes of cases may be commenced in either the state or the federal courts; and

CHAP.

XLI

4. Inter-
mediate
courtsState
courts in-
dependent
of federal
courts

¹ Alabama, Colorado, Florida, Maine, Massachusetts, Missouri, New Hampshire, Rhode Island, and South Dakota. Before the Civil War the state supreme courts frequently rendered advisory opinions even in the absence of any constitutional authorization. The pronounced tendency in more recent years has been for them to refrain from giving extra-judicial advice when not required to do so by the constitution. In 1923, however, the supreme court of Alabama upheld as constitutional a mere statutory authorization of advisory opinions. A brief summary of this decision appears in *Amer. Polit. Sci. Rev.*, XIX, 565-566 (Aug., 1925). The best treatise on this subject is A. R. Ellingwood, *Departmental Coöperation in State Government* (Menasha, Wis., 1918).

² In some states the same judges administer both common law and equity, but in others there are separate courts of equity or chancery to handle cases to which, for one reason or another, common law forms of action do not apply. Some states also permit themselves to be sued in what are called courts of claims. New York has gone farther than most states in opening its court of claims to actions based upon both contract and tort. Where such a court does not exist private appeals are often made to the legislature; and in some states this has been productive of grave abuses. See P. S. Reinsch, *Readings on American State Government*, 168-172.

³ Cf. A. Kocourek, "Relief for the Appellate Courts; the Referendary System," *Jour. Amer. Judic. Soc.*, VII, 122-130 (Dec., 1923); G. F. McNoble, "Plan to Assist Appellate Judges," *ibid.*, IX, 185-188 (Apr., 1926).

any case originating in a state court which involves the determination of any right claimed under the national constitution, laws, or treaties, may be transferred or carried on appeal to the federal courts. The great majority of cases coming before the state courts do not, however, raise any such "federal question," but involve simply the adjudication of rights claimed under the state constitution, the state statutes, or the old English common law when not modified by state legislation.

Even a bare outline of the judicial machinery of the state should mention certain officers who assist the courts in the administration of justice. The attorney-general of the state often appears before the courts to represent the state in pending litigation, and sometimes he exercises a limited supervision over the enforcement of the criminal laws or the trial of criminal cases by the county prosecuting attorneys. The importance of the prosecuting attorney and of the sheriff as the executive officer of the courts will be more fully commented on in chapters on county government.¹ Attached to all courts of record is an officer variously called a clerk, a register, or a prothonotary, sometimes appointed by the judges constituting the court, but in many states elected by popular vote. This official keeps the court records, issues legal processes as directed by the court, and is custodian of the court seal.

Many civil cases are tried by one or more judges without a jury; but all of the state constitutions contain provisions guaranteeing trial by jury in most civil cases, unless waived by the parties to the suit, and also in all criminal cases with the frequent exception of petty misdemeanors.² In most states the trial jury is merely the judge of the facts in the case, the court itself passing upon all questions of law arising incidentally to the introduction of evidence before the jury or otherwise applicable to the case. In some states, however—Illinois, for example—the jury is made the judge of both the law and the facts. At common law the petit or trial jury consisted of twelve impartial men, and their unanimous agreement was required for the rendition of a verdict. This

¹ Chaps. XLIII-XLIV.

² Under a Connecticut law, passed in 1921, the accused in a criminal case is given the choice of a trial by the court or trial by jury. Since the law went into effect only about thirty per cent of the criminal cases have been tried by jury. A similar choice has long been authorized in Maryland and in 1924 over 90 per cent of the cases tried in the criminal court of Baltimore were tried without a jury. See C. T. Bond, "Maryland Practice of Trying Criminal Cases by Judges Alone, without Juries," *Amer. Bar. Assoc. Jour.*, XI, 699-703 (Nov., 1925); W. M. Maltbie, "Criminal Trials Without a Jury in Connecticut," *Jour. Crim. Law and Criminol.*, XVII, 335-342 (Nov., 1926).

rule still prevails in a majority of the states, but in recent years modifications of the old jury trial, in both civil and criminal cases, have been adopted in about a third of the states. For example, the constitutions of twelve states now authorize civil trials, in courts of record, by juries of less than twelve persons, and seven states make similar provisions for criminal trials.¹ Eighteen state constitutions authorize verdicts by something less than unanimous vote (usually three-fourths) in civil cases, and six states apply the same rule to most criminal cases, although in capital cases all states still require a unanimous verdict of a jury of twelve.

CHAP.
XLI

Like the petit jury, the grand jury has been inherited from English common law; but unlike the petit jury, it has nothing to do with the actual determination of the guilt or innocence of persons accused of crimes: it is concerned almost exclusively with the commencement of criminal proceedings. Upon its own initiative, it may bring indictments against persons who, in its judgment, have violated the laws of the state. But in most instances the initiative is taken by the prosecuting attorney, who lays before the grand jury the evidence which, in his judgment, is sufficient to justify placing the accused person on trial. If the grand jury concurs, it endorses upon the draft indictment prepared by the prosecuting attorney the words "a true bill," and the foreman of the jury attaches his signature. If, on the other hand, the grand jury is not satisfied that the prosecuting attorney has sufficient evidence to make out a "prima facie case" against the accused, it generally instructs its foreman to endorse on the draft indictment "this bill not found." Proceedings before a grand jury are secret and wholly *ex parte*, or one-sided, unless the accused voluntarily submits to an examination before the body.

The grand
jury

Indict-
ments

At common law the grand jury consisted of not fewer than thirteen nor more than twenty-three men, and the concurrence of twelve was necessary for the bringing of an indictment. State constitutions or statutes in almost a third of the states now provide for a smaller grand jury and a corresponding reduction in the number whose concurrence is required. In all but ten states the constitution provides for the periodical summoning of the grand jury, and in these ten similar provision has been made by statute. In earlier times the institution of the grand jury furnished much-needed protection to the private citizen against arbitrary prosecu-

Diminished
importance
of the
grand jury

¹ In trials before justices of the peace juries of six persons are authorized in some states.

tion for alleged criminal offenses by officers of the crown; and throughout the early history of the states indictment by grand jury was required for the prosecution of practically all crimes. Under modern conditions, however, the grand jury seems to be an unnecessarily cumbersome and expensive method of instituting criminal prosecutions; and we find that, although about half of the states still require indictment for all of the more serious offenses called felonies, the other half have departed in varying degrees from the old common-law practice. Some constitutions expressly authorize the abolition or modification of the grand-jury system by the legislature; others make prosecution by indictment or by information alternative processes regardless of the seriousness of the offense.¹ In a half-dozen states in which indictment and information are concurrent processes a grand jury may be called only upon an order of the judge of a court having power to try and determine felony cases. In such states indictment by grand jury is rarely resorted to, and practically all criminal prosecutions are instituted by the process called information. Under this process the prosecuting attorney files with the proper court a formal charge in which, upon his oath of office, he "gives said court to understand and *be informed*" that the crime described therein has been committed by the person therein named; and from this phraseology the process gets its name, "information."²

When eminent leaders of the bar, able and respected judges of both state and federal courts, deans and professors of the best law schools, and an ex-president and chief justice of the United States,³ concur in pronouncing the organization of our state courts

¹ California was one of the first states to authorize (1879) the prosecution of felony cases by information instead of indictment. In a murder case it was contended that the new procedure violated the "due process" clause of the Fourteenth Amendment. The Supreme Court, however, held to the contrary, in *Hurtado v. California*, 110 U. S., 516 (1884).

² For further facts relating to the grand and petit jury systems, see *Ill. Const. Conv. Bull.*, No. 10 (1920), "The Judicial Department," 828 ff.; McLaughlin and Hart, *Cyclopedia of Amer. Govt.*, II, 268; "Grand Jury Reform," *Jour. Amer. Judic. Soc.*, IV, 77-82 (Oct., 1920); R. J. Miller, "Information or Indictments in Felony Cases," *Jour. Amer. Judic. Soc.*, VIII, 104-120 (Dec., 1924); "Michigan's 'One Man Grand Jury,'" *ibid.*, VIII, 121-123 (Dec. 1924); H. R. Keeble, "The Grand Inquest of the County," *Amer. Mercury*, V, 142-146 (June, 1925); J. E. Babb, "Problems of Trial by Jury," *Amer. Polit. Sci. Assoc. Proceedings*, IV, 240-245 (1907); C. P. Patterson, "The Jury System of the Southwest," *Southwestern Polit. Sci. Quar.*, IV, 220-237 (Dec., 1923); E. M. Sheridan, "Women and Jury Service," *Amer. Bar. Assoc. Jour.*, XI, 792-797 (Dec., 1925); E. W. Brainerd, "Ladies of the Jury," *The Woman Citizen*, XII, 14-15 (July, 1927).

³ President, now Chief Justice, Taft said in 1909: "It is not too much to say that the administration of criminal law in this country is a disgrace

and their methods of administering justice in both civil and criminal cases sadly defective, if not in grave danger of breaking down, the average lay citizen may well become interested in the situation and in the remedies which are proposed. The criticisms most frequently directed against the state judicial system fall into three main groups. The first relates to the structure or organization of the courts, including the term for which judges are chosen, their compensation, and especially the method of selecting and removing them; the failure to develop highly specialized courts for the exclu-

CHAP.
XLI

1. As seen
in the or-
ganization
of the
courts

to our civilization, and that the prevalence of crime and fraud, which here is greatly in excess of that in European countries, is due largely to the failure of the law and its administration to bring criminals to justice." Quoted in M. Storey, *The Reform of Legal Procedure*, 3. See also R. B. Fosdick, *American Police Systems* (New York, 1921), Chap. I.

So interlocked are problems of court organization and procedure and crime prevention and punishment that the following selected references will be found useful: W. B. Swaney, "The State Judiciary and Law Enforcement," *Virginia Law Rev.*, IX, 363-375 (Mar., 1923); "Report of the Committee on Law Enforcement," *Amer. Bar Assoc. Jour.*, IX, 660-668 (Oct., 1923); J. B. Waite, "Punishing One in Ten: Our Failure to Enforce the Law," *Atlantic Mo.*, CXXXIX, 63-70 (Jan., 1927); C. K. Burdick, "Criminal Justice in America," *Amer. Bar Assoc. Jour.*, XI, 510-515 (Aug., 1925); E. B. Howell, "Inefficient Courts and the Crime Wave," *Rev. of Revs.*, LXXV, 35-37 (Jan., 1927); C. F. Carter, "The Carnival of Crime in the United States," *Curr. Hist.*, XV, 753-762 (Feb., 1922); J. B. Reynolds, "What Is Our Crime Record?" *ibid.*, XVII, 383-388 (Dec., 1922); J. T. White, "The Causes of the Crime Wave," *Amer. Bar Assoc. Jour.*, XIII, 726-732 (Dec., 1927); G. W. Kirchwey, "Crime Waves and Crime Remedies," *The Survey*, LV, 593-597 (Mar. 1, 1926); "What Makes Criminals?" *Curr. Hist.*, XXVII, 315-319 (Dec., 1927); G. A. Thompson, "The Missouri Crime Survey," *Amer. Bar Assoc. Jour.*, XII, 626-632 (Sept., 1926); *Acad. Polit. Sci. Proceedings*, X, No. 3 (July, 1923), series of articles on "Law and Justice"; *Annals Amer. Acad. Polit. and Soc. Sci.*, CXXV, 1-264 (May, 1926), series of articles on "Modern Crime: Its Prevention and Punishment"; *Curr. Hist.*, XXVII, 303-364 (Dec., 1927), symposium on "Crime Menace"; *Amer. Year Book* (1925), 612-634 (1926), 619-638; J. Miller, "The Compromise of Criminal Cases," *South. California Law Rev.*, I, 1-31 (Nov., 1927); An Ex-Convict, "The Criminal Lawyer as a Cause of Crime," *Outlook*, CXIV, 911-913 (Dec. 27, 1916); L. Veiller, "The Rising Tide of Crime," *World's Work*, LI, 133-143 (Dec., 1925); "The Menace of Paroled Convicts," *ibid.*, 363-375 (Feb., 1926); "Where American Justice Fails," *ibid.*, 499-509 (Mar., 1926); "The Way to War on Crime," *ibid.*, 602-609 (Apr., 1926); "Turning the Criminals Loose," *ibid.*, LIII, 546-555 (Mar., 1927); "Prisons or Men's Clubs—Which?" *ibid.*, LIV, 84-95 (May, 1927); C. C. Nott, "Coddling Criminals," *Scribner's*, LXXIX, 540-543 (May, 1926); H. L. Witmer, "The History, Theory, and Results of Parole," *Jour. Crim. Law and Criminol.*, XVIII, 24-64 (May, 1927); J. P. Bramer, *A Treatise Giving the History, Organization, and Administration of Parole* (New York, 1927); G. W. Alger, *Report . . . on the Board of Paroles and Parole System . . . of the State of New York* (1926); J. F. W. Meagher, "Crime and Insanity: A Discussion of Some Modern Radical Theories," *Jour. Crim. Law and Criminol.*, XVI, 360-387 (Nov., 1925); H. E. Barnes, "The Case Against Capital Punishment," *Curr. Hist.*, XXIV, 365-370 (June, 1926); "The Question of Capital Punishment," *Cong. Digest*, VI, 219-244 (Aug.-Sept., 1927); R. Moley, "Some Tendencies in Criminal Law Administration," *Polit. Sci. Quar.*, XLII, 497-523 (Dec., 1927).

sive handling of certain classes of cases;¹ the overlapping jurisdiction of different courts, and the absence in most states of unity in judicial organization; a very general failure to recognize that the efficiency with which justice is administered depends largely upon proper provision for handling the administrative side of court work;² and the equally general failure to ensure centralized supervision over the work of judges of the different courts throughout the state, who at present are legally independent of one another and usually quite uncontrolled by any central directing head.

A second group of criticisms, although arising in part from the absence of a unified judicial system, relate chiefly to court procedure:³ protests (a) against the absence of rule-making power on the part of courts;⁴ (b) against the numerous petty limitations imposed upon the trial judge by legislative action; (c) against the frequent amendment, in some states, of the rules of court procedure by the legislature, often at the behest of litigants who hope thereby to gain some advantage in a particular case;⁵ (d) against the inability of the trial judge really to control the procedure in his court as an English judge is able to do; (e) against the unlimited right of appeal which, in civil cases, works against the interest of the poor litigant and, in criminal cases, often defeats the ends of justice; (f) against the tendency of appellate courts to reverse decisions of lower courts upon purely technical grounds not affecting the merits of the case; (g) against the long delays in bringing

¹ Except in some of our large cities, where highly specialized courts are to be found. See Chap. XLVIII. Cf. H. Harley, "Court Organization for a Metropolitan District," in *Amer. Polit. Sci. Rev.*, IX, 507-518 (Aug., 1915).

² The term administrative work here refers to the preparation of jury lists, supervision of grand jury work, service of court processes, keeping records and transferring cases from one court to another, and the appointment and supervision of receivers, administrators, executors, referees, and masters in chancery. The problems of judicial administration are not unlike those connected with the state administrative departments.

³ The non-professional student will find interesting and illuminating criticisms of court procedure in G. W. Alger, "Swift and Cheap Justice," *World's Work*, XXVI, 653-666 (Oct., 1913), and XXVII, 53-62, 160-175, 338-346, 424-432 (Nov., 1913, to Feb., 1914); W. H. Taft, "Delays and Defects in the Enforcement of Law," and J. W. Garner, "Crime and Judicial Inefficiency," both of which are reprinted in P. S. Reinsch, *Readings on American State Government*, 173-198.

⁴ *Jour. Amer. Judic. Soc.*, IX, 122-125 (Dec., 1925), "Procedural Reform Calls for Rule-Making"; C. B. Whitten, "Regulating Procedure by Rules," *ibid.*, XI, 15-19 (June, 1927); E. R. Sunderland, "The Exercise of the Rule-Making Power," *Amer. Bar Assoc. Jour.*, XII, 548-552 (Aug., 1926); "The Rule-Making Power of the Courts," *ibid.*, XIII, Part II, 1-16 (Mar., 1927).

⁵ R. Pound, "The Rule-Making Power of the Courts," *Jour. Amer. Judic. Soc.*, X, 113-120 (Dec., 1926); *Amer. Bar Assoc. Jour.*, XII, 599-603 (Sept., 1926); *Transactions Common. Club of Cal.*, XIII, 123-163 (June, 1918).

criminal cases to trial (partly due to the cumbersome grand jury system), with the result that criminals often go scot free because of the death or disappearance of important witnesses; (h) against the unrestricted admission to bail of old offenders; (i) against the poor pay and poor quality of jurymen generally,¹ and the inordinate delays attending the selection or empaneling of juries in criminal cases; (j) against the long-drawn-out examination of witnesses and the unlimited number of objections to testimony permitted to counsel; (k) against the rule that the failure of the accused to testify may not be commented upon before the jury by the prosecution; (l) against the requirement of unanimous verdicts by juries; (m) against the rule in a few states permitting juries to be judges of the law as well as of the facts;² and finally (n) against the absence of unified control over the various prosecuting officers throughout the state, resulting in uneven enforcement of criminal laws and lowered efficiency in the conduct of criminal prosecutions.

Limitations of space permit the consideration of only four principal criticisms: (1) the lack of unity throughout the judicial system, (2) the methods of selecting judges, (3) their removal from office, and (4) the judicial veto on legislation.

In our study of state administration³ we have seen how highly important it is to have unified supervision and control over the various disjointed and disconnected administrative agencies. The same sort of supervision and control is essential to the most effective functioning of the state's judicial machinery. We are accustomed to speak of the state's judicial "system," but in the great majority of commonwealths, it is a system only in name and in

Disjointed
court or-
ganization

¹ Cf. *Transactions Common. Club of Cal.*, XV, 387-424 (Dec., 1920), "The Selection of Jurors"; C. N. Callender, *The Selection of Jurors* (Philadelphia, 1924).

² Criticisms and defense of the jury system may be found in the following references: W. H. Blymer, "The Reform of the Jury System in Civil Cases," *Green Bag*, XXVI, 203-217 (May, 1914); E. Bullivant, "Abolition of Jury Trials in Civil Cases," *Oregon Law Rev.*, V, 185-199 (Apr., 1926); B. G. Seville, "Trial by Jury: An Ineffective Survival," *Amer. Bar Assoc. Jour.*, X, 53-57 (Jan., 1924); C. Hall, "The Present-Day Jury: A Defense," *ibid.*, X, 111-115 (Feb., 1924); E. R. Sunderland, "The Problem of Trying Issues," *Jour. Amer. Judic. Soc.*, XI, 20-28 (June, 1927); C. C. Nott, "The Juror's Part in Crime," *Scribner's*, LXXIX, 94-96 (Jan., 1926); L. N. Robinson, "The Revolt of the Jury," *Jour. Crim. Law and Criminol.*, XVIII, 100-104 (May, 1927); R. N. Wilkin, "The Jury: Some Reforms by Reversion," *Amer. Bar Assoc. Jour.*, XIII, 50-51 (Jan., 1927); R. W. Millar, "The Modernization of Criminal Procedure," *Jour. Amer. Judic. Soc.*, IX, 135-151 (Feb., 1926); "Where Jury Trial Fails," *ibid.*, IX, 71-73 (Oct., 1925).

³ See p. 761.

theory. Unified supervision and control is very generally unprovided, not only for the different courts throughout the state, but also for the judges making up any particular court. It seems self-evident that all of the courts comprised in the so-called judicial system should be closely articulated with one another, and that there should be some chief justice or judicial council to coördinate the work of the several courts and devise plans for an effective division of labor among them. Instead of this, we find in the majority of states "a jumble of disconnected and disjointed courts, each pursuing its own way, with little regard to any other."¹

Likewise, in the case of any particular court it seems equally self-evident that the maintenance of judicial efficiency calls for a chief justice or small committee of judges clothed with authority to supervise the work of all judges belonging to that court, to require reports from them as to the state of business on their dockets, to admonish the careless and indolent judge, to relieve the overworked, and to keep them all reasonably busy. As matters stand, however, in nearly every part of the country the judges in the same court are elected independently of one another and seldom are made subject to any real directing or supervisory control. Each judge is thus legally independent of every other judge and of all together; he can hold court when he pleases, for as few hours a day as he pleases, and hear cases on such calendars as he pleases; whatever coöperation, teamwork, or division of labor exists depends almost wholly upon the voluntary coöperation of the judges constituting the court.

With such a loose judicial organization, or lack of organization, it is not surprising that there are few reliable statistics showing what our different state courts are doing; so that of most of our states it may truly be said, "the judiciary is the one department which publishes no data bearing upon the efficiency of its work, and without such data there is no adequate basis for judging how well it is performing its duties or what changes are needed to increase its efficiency."² In connection with the administration of criminal justice this absence of complete judicial statistics is particularly unfortunate, since it leaves us often without the means for coördinating the few and unsystematic figures kept by the police, jailors, magistrate's courts, the higher criminal courts, the prosecutors, and

¹ W. N. Gemmill, "What Is Wrong with the Administration of Our Criminal Laws?" *Jour. Crim. Law and Criminol.*, IV, 698-711 (Jan., 1914).

² W. R. Potter, president of the Michigan Bar Association, in *Jour. Amer. Judic. Soc.*, VI, 168 (Apr., 1923).

the wardens of penal and reformatory institutions. In this respect we are said to be generations behind other civilized nations. "Without statistical records our system has no memory. It does not know what it has done heretofore, or the consequences of its actions, or what it should do in the future. . . . We do not know what classes of people contribute to various kinds of crime; we do not know what various judges do with respect to sentencing; we do not know what the results of various kinds of treatment and administration are."¹ There must be some central judicial authority if we are to have efficient coöperation among the different courts and among the score or more of judges attached to them; we must have some central judicial head; and it is through such a controlling headship that essential judicial statistics can be obtained, correlated, and interpreted most successfully.²

CHAP.
XLI

Until very recently, substantially the same defects as those enumerated above characterized the organization and work of the various federal courts. But we have seen that a recent act of Congress (1922) has paved the way for a close coördination, more adequate supervision, and equalization of the work of those tribunals.³ Happily, too, it may be said that an important beginning of reform along similar lines has appeared in a few of the states. The Louisiana constitution of 1921 provides for a more highly unified judicial system than is to be found at present in any other state.⁴ Noteworthy progress in the same general direction has also been made in Massachusetts (1924), California (1926), and sev-

Beginnings
of reform

¹ H. Harley, "Criminal Justice and How to Achieve It," *Nat. Mun. Rev.*, XI, Supplement, 14-16 (Mar., 1922). "We want to know more than we now know concerning the number of crimes that are reported to public authorities in this country. That is the measure of crime. We want to know what happens to those who are arrested . . . what happens to these cases thus initiated . . . how many drop out in the preliminary hearings . . . how many drop out in the next stage. Then . . . we want to cross reference these facts and correlate them in order to determine, so far as possible, what degree of efficiency our agencies for the prosecution of criminals are attaining. . . ." R. Moley, quoted in *Curr. Hist.*, XXVII, 306 (Dec., 1927). See also L. N. Robinson, *Criminal Statistics in the United States* (Boston, 1927); "Criminal Statistics and Identification of Criminals," *Nat. Mun. Rev.*, XVI, 769-777 (Dec., 1927); L. D. Upson, "The 'Squeal Book'," *ibid.*, XVI, 695-699 (Nov., 1927).

² Excellent articles dealing with various aspects of judicial reform, especially those related to the structure and organization of the courts, will be found in the bi-monthly issues of the *Journal of the American Judicature Society* (357 East Chicago Ave., Chicago), and the numerous bulletins published by this Society, whose object is the promotion of the efficient administration of justice.

³ See pp. 437-438.

⁴ Art. VII, §§ 10, 12.

eral other states,¹ where judicial councils have been established whose duty it is to collect and study court statistics, to formulate rules for the equalization and more efficient handling of court business, and to recommend to the legislature needed changes in the laws governing court organization and procedure. More thoroughgoing reforms in most states, however, will have to await the adoption of constitutional amendments. The goal toward which advocates of judicial reform are working is the consolidation of all the different courts into one court for the entire state, the existing courts serving merely as branches of this unified state court, as is shown in the accompanying diagram. Each of these branch courts, or divisions, would work under the constant supervision of either a chief justice or a small council of judges representing the main divisions of the court; and to this head of the judicial system every judge would be required to make periodical reports upon the business transacted in his court.² It is believed by those in a position to speak with authority that such a reorganization of the state judicial system would enhance its general usefulness incalculably.

¹ Ohio and Oregon (1923), North Carolina and Washington (1925), North Dakota (1926), Connecticut, Kansas, Rhode Island, and Texas (1927). Unsuccessful efforts to establish a judicial council or other unifying agency have been made in a few other states. The judicial council movement is perhaps the most important development in connection with state courts during the past decade. Of the many articles which have appeared on the subject, the following are recommended: C. S. Potts, "Unification of the Judiciary: A Record of Progress," *Jour. Amer. Judic. Soc.*, VII, 85-91 (Oct., 1924); C. H. Paul, "The Judicial Council and Reform of Judicial Procedure," *Oregon Law Rev.*, V, 1-26 (Dec., 1925); J. F. Sly, "California's Judicial Council in Full Swing," *ibid.*, XI, 9-12 (June, 1927); R. G. Dodge, "Judicial Councils," *Amer. Bar Assoc. Jour.*, XII, 579-582 (Aug., 1926); C. D. Laylin, "Judicial Council in Ohio," *Amer. Polit. Sci. Rev.*, XVII, 608-611 (Nov., 1923); C. H. Paul, "The Judicial Council Movement," *ibid.*, X, 78-86 (Oct., 1926); A. B. Ridgway, "The American Judicial Council: Its Powers and Possibilities," *ibid.*, V, 292-306 (June, 1926). The annual reports of the Massachusetts judicial council may be found in *Mass. Law Quart.*, XI, 1-162 (Nov., 1925); XII, 1-128 (Dec., 1926); XIII, 1-142 (Nov., 1927).

² The Model State Constitution of the National Municipal League provides for a general court of justice, as a single court for the entire state, divided into three departments for handling different kinds of cases, namely, the supreme court, the district court, and the county court. At the head of the general court is a chief justice appointed by the governor for a ten-year term, and clothed with real supervisory and directing authority over all the associate judges. A judicial council is also provided for, representing all parts of the judicial system, and having extensive power to make rules of pleading and practice, subject to modification or veto by the legislature. See §§ 52-71, pp. 36-39; R. Pound, "Organization of Courts," *Jour. Amer. Judic. Soc.*, XI, 69-83 (Dec., 1927); also "Draft of Model Act Pertaining to Organization and Structure of Courts," *ibid.*, XI, 99-116 (Dec., 1927); XI, 145-154 (Feb., 1928).

DIAGRAM SHOWING UNIFIED STATE COURT

GENERAL COURT OF JUDICATURE

JUDICIAL FUNCTION

Court of Appeal

SUPREME COURT DIVISION

Chief Justice and
six judges

ADDITIONAL BRANCHES

of three judges each

ADMINISTRATIVE FUNCTION

(In aid of Judicial Function)

CHIEF JUSTICE

PRESIDING JUSTICE
of the Supreme Court division
& branches of Court of Appeal

PRESIDING JUSTICES
OF THE DIVISIONS OF
the Superior Court.

PRESIDING JUSTICE
of County Courts

COUNTY JUDGES

RULE-MAKING

FUNCTION

(In aid of Judicial
Function)

Judicial Council
Composed of

CHIEF JUSTICE
ONE MEMBER of Court
of Appeal
PRESIDING JUSTICES
of Superior Court
PRESIDING JUSTICE
of County Court

Superior Court

(Five territorial divisions)

FIRST DIVISION

Presiding
Justice &
judges
masters

SECOND DIVISION

Presiding
Justice &
judges
masters

THIRD DIVISION

Presiding
Justice &
judges
masters

FOURTH DIVISION

Presiding
Justice &
judges
masters

FIFTH DIVISION

Presiding
Justice &
judges
masters

COUNTY COURT

A Presiding Justice; one branch and one County Judge for each
County; in certain more populous Counties one or more
Associate County Judges.

A matter of even more frequent criticism than the lack of unification in the judicial system is the prevailing method of selecting judges. In the early history of the country judges were chosen by the legislature or appointed by the governor with the concurrence of the executive council or the senate. These methods are now retained in only ten states;¹ in the others the judges of practically all courts are chosen by popular vote. Professional as well as lay opinion is somewhat divided on the wisdom of this method, but "information collected from a large variety of representative sources of professional opinion seems to indicate that in only three out of the thirty-eight states that elect judges by popular vote are the results considered to have been generally satisfactory—these being Maryland, Iowa, and, in a special degree, Wisconsin. In five others, New York, Pennsylvania, Michigan, Minnesota, and Missouri, the system is said to give fair satisfaction, and in all the rest there are different grades of professional dissatisfaction with it."²

Long experience has disclosed two inherent weaknesses of the elective system: first, in populous communities, especially in metropolitan districts, popular election is no more likely to result in the choice of persons qualified to perform the highly technical work required of the judiciary than it is to secure the selection of experts in other branches of state government or in the field of municipal administration;³ second, what passes under the name of popular election of judges is often such in only the most superficial sense, being in reality nothing more than a method of appointment by

¹In four states (Vermont, Rhode Island, Virginia, and South Carolina) the judges of the highest courts are chosen by the legislature; in six states (Maine, Massachusetts, New Hampshire, Connecticut, Delaware, and New Jersey) they are appointed by the governor subject to confirmation by the executive council, the senate, or the legislature; in the remaining thirty-eight states they are elected by the people.

²J. P. Hall, "The Selection, Tenure, and Retirement of Judges," in *Jour. Amer. Judic. Soc.*, III, 37-52 (Aug., 1919); L. Hand., "The Elective and Appointive Methods of Selecting Judges," *Acad. Polit. Sci. Proceedings*, III, 130-140 (1913).

³"The chief objection to choosing judges by popular vote lies in the fact that a judge, in addition to any other qualifications, must possess certain technical knowledge and experience. However high his character, however sound his general intellectual equipment, however wide his acquaintance with business or public affairs, he must also possess a technical knowledge of the law and of legal procedure. To ask the public at large to pass upon a question of technical fitness in the case of a lawyer is as inappropriate as it would be to ask for a similar judgment regarding the technical fitness of an engineer, or a doctor, or a musician . . . the determination of technical fitness is obviously a task in which only a comparatively few persons can helpfully take part. . . ." W. MacDonald, *A New Constitution for a New America*, 182-183.

politicians who succeed in putting their judicial "slates" through a so-called non-partisan primary, or through party primaries, or through nominating conventions. All that is generally left for the voter to do on election day is to endorse one or the other of two judicial tickets thus submitted by irresponsible persons who are not primarily interested in the efficient administration of justice,¹ and who, therefore, often fail to pick candidates having the qualities most needed in a judge, namely, unquestioned integrity, dignity, independence, judicial temperament, and adequate legal training for highly technical duties.²

Despite widespread and well-justified dissatisfaction with the practical workings of popular election of judges, the system has become so firmly entrenched in the popular mind and has contributed so greatly to the influence of certain political leaders that there seems little prospect of an early return to either the method of legislative election or that of executive appointment. Most of the newer plans on the subject have, therefore, sought to combine the best features of popular election with some method of appointment designed to ensure open and official responsibility.³ One of these plans proposes simply that whenever an important judgeship is to be filled, the governor shall be permitted to nominate a candidate for each vacancy in addition to any other nominee that there may be. The voters would then have an opportunity to elect the governor's candidate if he seemed a better man than any one of

Proposed
substitutes
for popular
election

¹ Sometimes, however, the politicians overreach themselves. This happened in Chicago, in 1921, when the Thompson-Lundin machine in control of the city government set out to capture the twenty circuit court judgeships in the June election. The effort roused the community as few political incidents have done in recent years and resulted in overwhelming defeat for the machine. See A. C. Miller, "How the Chicago Bar Association Walloped the Spoils-men," *Jour. Amer. Judic. Soc.*, V, 46-52 (Aug., 1921).

² It may be said that, in general, we have in our judiciary extraordinarily competent and highly qualified judges, but that, on the other hand, we have judges who are incompetent, and deficient both in learning and judicial ability. For a searching criticism of judicial qualifications and methods, see the preface to J. H. Wigmore, *A Supplement to a Treatise on the System of Evidence* (2nd ed., Boston, 1915).

³ In other countries, appointment in some form is almost universally employed. See H. Harley, "Taking Judges Out of Politics," *Annals Amer. Acad. Polit. and Soc. Sci.*, LXIV, 184-197 (Mar., 1916); "How Shall Judges Be Chosen?" *Jour. Amer. Judic. Soc.*, III, 75-90 (Oct., 1919); G. B. Harris, "Taking Judges Out of Politics," *Jour. Amer. Judic. Soc.*, VIII, 258-262 (June, 1924); Report of Committee, "Who Shall Choose Our Judges?" *ibid.*, VIII, 48-57 (Aug., 1924); "Selection of Judges," *Transactions Common. Club of Cal.*, IX, 305-350 (June, 1914); "Appointment of Judges," *ibid.*, X, 150-179 (Apr., 1915); "Judicial Elections," *ibid.*, XXII, 329-364 (June, 1927); H. J. Laski, "Technique of Judicial Appointment," *Jour. Amer. Judic. Soc.*, X, 39-46 (Aug., 1926); Cleveland Bar Assoc., "Report Recommends Appointment of Judges," *ibid.*, X, 177-183 (Apr., 1927).

the candidates put up by the unofficial party leaders. Another proposal gives to the members of the state bar association, who presumably are better fitted than the politicians to pick properly qualified judicial candidates, a similar privilege of nomination. It is interesting to note in passing that in the state where popular election appears to have worked most successfully, namely, Wisconsin, this result is attributable mainly to an extra-legal practice whereby judges are virtually nominated by the bar association. Doubtless each of these two plans would operate most successfully where judges are elected on non-partisan ballots.

A third plan repeatedly urged as a constitutional amendment in California, authorizes the governor to nominate all judges not later than July first of the year in which a judicial election occurs. At the November election the people of the state, or of the judicial district concerned, would vote to confirm or reject the governor's nominations, a majority of those voting on the question being necessary to confirmation. If a nominee were rejected, the governor would be required to appoint some other person to fill the vacancy until the next election. This plan "has most of the advantages of an outright appointment by the governor, but leaves the ultimate control with the voters, plus the very desirable feature that the nominee is not running against somebody, thus greatly diminishing the prospect of extraneous considerations influencing the electorate."

The most radical plan recently proposed is the popular election of a chief justice in each court for a moderate term, and appointment by him of the other judges in his court as vacancies arise; such appointments to be for life unless, at stated intervals, the people should vote to retire any particular judge or judges. Three years after his appointment the name of each judge would go on a judicial ballot with the question, "Shall he be retained or retired?" Unless a majority voted to retire him, he would remain in office. Again, seven years later, the same question would be asked, and again ten years thereafter. Thus in twenty years the voters would have three chances to retire a judge thought by them to be unfit. But the judge would never run against any one, or on any party ticket; he would run only against his own record. The chief justice would presumably be chosen largely upon the basis of his fitness to select good associate judges, with the result that these judges would probably be very carefully selected. Furthermore, each judge would serve a probationary period before a

popular verdict is rendered on his work, and from that popular verdict all irrelevant considerations, such as the personal popularity of some rival candidate, would be eliminated.¹

CHAP.
XLI

The question of how to retire from office judges who prove incompetent or unworthy of public confidence presents a problem of peculiar difficulty, and no state has solved it in a way that meets with anything like general approval. The ideal method of removal must be one which can be put into operation without undue delay, and which, nevertheless, ensures for the judge whose removal is sought a fair hearing before a tribunal free from partisan bias and not subject to the influence of waves of popular passion. Three or four principal methods now in use in the different states fail, in varying degrees, to meet these requirements.

Removal
of judges:

Where judges are selected by popular election, retirement may be effected by refusal of the party leaders to approve the renomination of a judge, either because they regard his character or work as unsatisfactory or because they desire to provide a place on the bench for some political friend; and wherever political organizations are strong this refusal is usually decisive.² If, furthermore, the party leaders see fit to permit or sanction a judge's renomination, he may be retired by failure of the voters to reelect him. Popular election, however, is quite as likely to bring wrong results as right ones, for it often happens that a judge whose work on the bench has been entirely satisfactory is defeated for reelection by circumstances wholly unrelated to his record as judge; for example, because of the greater personal popularity or capacity for self-advertisement of some less qualified rival candidate, or because some overshadowing issue in state or national politics, wholly unconnected with the judicial election, has swept down to defeat the entire party ticket on which his name appeared. Furthermore, popular election furnishes a means of retiring an unworthy judge only at a given time, *i. e.*, at the expiration of his term of office.

1. By failure to
renominate
or reelect

In most states judges may be removed before the close of their term only by impeachment proceedings begun in the lower house

¹ For further discussion of these proposed methods, see *Jour. of Amer. Judic. Soc.*, especially Vol. III, 37-52 (Aug., 1919), 75-90 (Oct., 1919); A. M. Kales, "Methods of Selecting and Retiring Judges in a Metropolitan District," *Annals Amer. Acad. Polit. and Soc. Sci.*, LII, 1-12 (Mar., 1914); and *Amer. Judic. Soc. Bull.*, VI, reprinted as *Mass. Const. Conv. Bull.* No. 16 (1917); also in *Jour. Amer. Judic. Soc.*, XI, 133-144 (Feb., 1928); "The Selection and Retirement of Judges," *Transactions Common. Club of Cal.*, IX, 305-350 (June, 1914); *ibid.*, X, 150-179 (Apr., 1915).

² See W. R. Smith, "Politics and the Judiciary," in P. S. Reinsch, *Readings on American State Government*, 158-167.

CHAP.
XLI

2. By impeachment or by legislative removal or address

3. By a recall election

Judicial veto of legislation

of the legislature and tried before the senate, a two-thirds vote of the latter usually being required for conviction and removal.¹ The constitutions of twelve states, however, provide for removal by the legislature, and in nine other states the governor can remove, upon address of the legislature, after the English manner.² Neither impeachment nor legislative removal is without serious defects. Under either method there is much delay, and partisan considerations are likely to exert an improper influence. Furthermore, evidence sufficient to convince two-thirds of the senate or legislature may be hard to obtain; and the offense may not be grave enough to be a crime, while yet being sufficiently serious to warrant public condemnation and impair the judge's usefulness. In actual practice it has been found that impeachment and legislative removal do not work, and that unfit judges have remained on the bench because no other modes of removal were available.

This experience has led seven states³ to adopt the drastic remedy of authorizing the holding of a special election in which the voters may recall the judge whose removal is sought. The people of these states have, however, rarely availed themselves of their power of recall: in no state has the device been invoked against a judge of a superior or supreme court; and no judge has been recalled because of popular dissatisfaction with a decision involving any question of constitutional interpretation.⁴

Another prolific source of criticism of state courts, among both lawyers and laymen, is their power to declare state laws null and void because inconsistent with some provision of the state constitution. In recent decades this veto power has been exercised with increasing frequency. The tendency may be explained in part by the minuteness with which the newer constitutions define the organization and functions of the various branches of the government;

¹In Nebraska, impeachment proceedings must be instituted by a joint session of the two houses, and the supreme court acts as the trial body, except when a judge of the supreme court is impeached; in that case, the impeachment court consists of all the district court judges of the state.

²L. A. Frothingham, "Removal of Judges by Legislative Address in Massachusetts," *Amer. Polit. Sci. Rev.*, VIII, 216-221 (May, 1914). One-third of the states have constitutional or statutory provisions permitting the retirement of judges on account of age or physical infirmity. See "Provisions for Judges' Retirement," *Jour. Amer. Judic. Soc.*, X, 91-94 (Oct., 1926).

³Arizona, California, Colorado, Kansas, Nevada, North Dakota, and Oregon.

⁴A. N. Holcombe, *State Government in the United States* (1926), 449. On two different occasions judges of the municipal court in San Francisco have been recalled, namely, in 1913 and 1921. See "A Judge Recalled by Women's Votes," *Literary Digest*, XLVI, 1048 (May 10, 1913); and P. Eliel, "Corrupt Judges Recalled in San Francisco," *Nat. Mun. Rev.*, X, 316-317 (June, 1921).

in part, by the incorporation in the constitution of matters which more properly belong in the sphere of legislative discretion; and especially by the attempt to set precise metes and bounds to the activity of the legislature, thus rendering the work of law-making the hazardous occupation described in an earlier chapter.¹ The experience of Illinois and other states shows that the cases in which the constitutionality of legislation has been challenged before the courts have multiplied as the number of restrictions on the legislature have been increased by successive revisions of the constitution.²

The state courts originally used the judicial veto principally to protect their own constitutional rights. In more recent years they have used it, however, mainly "to condemn the fruits of incorrect legislative procedure and especially to maintain the integrity of 'due process of law.'"³ Most of the protests against the judicial veto have been prompted by decisions nullifying social and economic legislation on the ground that it amounted to the taking of property or a deprivation of liberty without due process of law; and the dissatisfaction arising from these decisions has been deepened by the prevailing uncertainty as to the meaning of the phrase "due process." Whether or not a given law will be upheld under this clause depends, not upon any definitely ascertainable standard or definition as to what constitutes due process, but upon the economic and political views of the members of the court at the time the case comes up for decision. Under such circumstances the judiciary not only exercises judicial authority but determines questions of public policy as well. In other words, the judicial servants of the people have come to exercise a political power which enables them, if they are so minded, to defeat the public will as expressed in legislation, at all events until the state constitution has been amended, or until the court has been reconstituted with judges holding different views of what is good public policy.

As a result of this situation, one finds not only the leaders of organized labor but able and prominent lawyers advocating the curtailment of the political power of the judiciary by one means or

CHAP.
XLI

"Due process" as a source of dissatisfaction

Possible checks on the judicial veto

¹ Chap. XXXVI.

² The greater part of this increase occurred in the last thirty years, the cases arising between 1890 and 1913 outnumbering those which arose in the seventy years preceding 1890. See *Ill. Const. Conv. Bull.* No. 10 (1920), "The Judicial Department," 847 ff.; B. F. Moore, "The Judicial Veto and Political Democracy," *Amer. Polit. Sci. Rev.*, X, 700-709 (Nov., 1916).

³ Between 1870 and 1913 there were 115 cases before the Illinois supreme court under the due process clause, and considerably more than one-half of these cases arose after 1900.

another.¹ Perhaps the most obvious remedy would be a shortening of the state constitution through the elimination of matters of a legislative nature, together with the detailed restrictions upon the legislature. Another remedy might take the form of establishing a time-limit of one year from the enactment of a statute, after which the law might not be attacked in the courts merely because of defects connected with its form or technique, or because of irregularities attending its passage through the legislature.

But perhaps the most satisfactory check on the judicial veto of social and economic legislation would be the omission from the state constitutions of the so-called due process clause or its equivalent. As the state supreme court is the final judicial interpreter of the state constitution, the due process clause now means just what the supreme court of each state interprets it to mean. With forty-eight different state courts interpreting identical clauses, due process is found to mean one thing in one state and another thing in another state, and something still different when the federal supreme court interprets an identical clause in the national constitution.² State supreme courts have frequently annulled legislation when practically identical laws have been upheld by other state courts and by the federal supreme court under the due process clause of the Fourteenth Amendment. Criticism of the exercise of the judicial veto would, therefore, largely disappear with the omission of the due process clause from the state constitutions, thereby leaving the protection of private rights mainly to the federal courts, guided by the precedents of the national supreme court. In the opinion of good lawyers, there are no rights under state due process clauses which are not quite as adequately safeguarded under the federal due process clause.³

¹ G. E. Roe, *Our Judicial Oligarchy* (New York, 1912); W. L. Ransom, *Majority Rule and the Judiciary* (New York, 1912); W. F. Dodd, "The Growth of Judicial Power," *Polit. Sci. Quar.*, XXIV, 193-207 (June, 1909); A. M. Kales, *Unpopular Government in the United States* (Chicago, 1914), Chap. xvii.

² For examples, see A. M. Kales, *op. cit.*, 204-207.

³ See *Ill. Const. Conv. Bull.* No. 10 (1920), "The Judicial Department," 852-853. Three states, Ohio, North Dakota, and Nebraska have adopted constitutional amendments requiring an extraordinary majority of the supreme court to declare a law unconstitutional. The Ohio amendment of 1912 requires the concurrence of at least all but one of the judges of the supreme court, except in affirming decisions of lower appellate courts declaring a law unconstitutional. In North Dakota a similar amendment, adopted in 1918, calls for the concurrence of at least four of the five judges constituting the supreme court; and the Nebraska amendment of 1920 requires the concurrence of five out of the seven supreme court judges. In Minnesota a like proposal, requiring the concurrence of five out of seven judges, was submitted to popular vote

In concluding our study of the state judicial system brief mention should be made of two important recent developments. Hitherto, our legal system has largely confined its remedial work to the redress of wrongs after their commission, and agencies of what has been well described as "preventive justice" have remained almost entirely undeveloped. Only within very narrow limits has it been possible to clear up *in advance* of hostile litigation any doubt as to the legal status of persons, the title to property, or the meaning of a contract. The last few years, however, have shown that people are coming to understand that "a system of law that will not prevent the doing of a wrong, but only affords redress after the wrong is committed, is not a complete system, and is inadequate to the present needs of society; that whenever a person's legal rights are so uncertain as to cause him potential loss or disturbance, the state ought to provide instrumentalities of preventive relief to remove the uncertainty before a loss or injury has been sustained."¹ In recognition of these facts the legislatures of about one-third of the states, beginning with New Jersey in 1915, have adopted what are known as "declaratory judgment" statutes,² broadening the field of preventive justice by permitting

CHAP.
XLIPreventive
justice1. The de-
claratory
judgment

in 1914 and rejected. See *Ill. Const. Conv. Bull.* No. 10 (1920), "The Judicial Department," 850 ff.

In 1912 Colorado adopted a constitutional amendment providing for the "recall," or popular review, of judicial decisions, on lines advocated by ex-President Roosevelt in an address before the Ohio constitutional convention in that year. In 1921, however, the supreme court of the state held that the amendment was in conflict with the national constitution and therefore invalid. For a summary of this decision, see *Amer. Polit. Sci. Rev.*, XV, 413-415 (Aug., 1921). On the recall of judicial decisions, see T. Roosevelt, "The Judges, the Lawyers, and the People," *Outlook*, CI, 1003-1007 (Aug. 31, 1912); W. D. Lewis, "A New Method of Constitutional Amendment," *Annals Amer. Acad. Polit. and Soc. Sci.*, XLIII, 311-325 (Sept., 1912); "The Recall of Judicial Decisions," *Acad. of Polit. Sci. Proceedings*, III, 37-47 (1913); W. F. Dodd, "Social Legislation and the Courts," *Polit. Sci. Quar.*, XXVIII, 1-17 (Mar., 1913).

¹E. M. Borchard, "The Declaratory Judgment," *New Republic*, XXV, 192-194 (Jan. 12, 1921); "The Declaratory Judgment—a Needed Procedural Reform," *Yale Law Journal*, XXVIII, 1-32, 105-150 (Nov.-Dec., 1918); W. F. Dodd, "Preventive Justice," *Amer. Bar Assoc. Jour.*, VI, 144-147, 151-153, (Nov., 1920).

²These laws are summarized in *Amer. Polit. Sci. Rev.*, XV, 261-264 (May, 1921); *ibid.*, XVIII, 305-312 (May, 1924). The declaratory judgment law of Michigan (1919) was held unconstitutional by the supreme court of that state (1920) on the ground that it imposed non-judicial duties upon the judiciary; see *New Republic*, XXV, 218-219 (Jan. 19, 1921). The Wisconsin law of 1919 was repealed in 1921 on the advice of the attorney-general of the state, following the Michigan decision. These are the only states in which such statutes have been held unconstitutional. A list of cases where declaratory judgment statutes have been upheld is given in *Amer. Polit. Sci. Rev.*, XX, 587, n. (Aug., 1926). The New York law reads as follows: "The supreme court shall

the courts to declare existing rights and duties before actual cause for a hostile law-suit has arisen.

The courts have always favored the settlement of legal disputes by arbitration, or compromise, after the trial has commenced; but almost contemporaneously with the adoption of declaratory judgment laws, legislation has appeared authorizing less formal, time-consuming, and expensive methods of adjusting legal disputes than prevail in ordinary judicial proceedings. Small-claim courts have become very common, especially in cities; and special courts of conciliation and arbitration have been set up, or existing courts have been empowered to adopt rules providing for conciliation and arbitration.¹ Conciliation takes place when parties to a dispute reach an accord through the mediation of a third party called the conciliator. Such an agreement, however, is not legally enforceable in the courts in case one party should fail to abide by it. In arbitration proceedings, on the other hand, the parties submit their controversy to a third party, called the arbitrator, and agree in advance to be bound by his decision; and his award is enforceable by either side like the judgment of a regular court.² Not the least of the merits to be found in these newer judicial agencies is the fact that all tend to encourage a spirit of good will and friendliness between the parties to a dispute and to prevent the development of the animosity and rancor which usually attend hostile litigation.

REFERENCES

- W. F. Dodd, *State Government* (New York, 1922), Chaps. XI-XIV.
J. M. Mathews, *American State Government* (New York, 1924), Chaps. XV-XVII.
A. N. Holcomb, *State Government in the United States* (2nd ed., New York, 1926), Chaps. XII-XIII.

have power in any action or proceeding to declare rights and other legal relations on request for such declaration, whether or not further relief is or can be claimed, and such declaration shall have the force of a final judgment." New York Civil Practice Act, § 473.

¹ A notable instance is found in the Municipal Court of the City of New York. See E. J. Lauer, "Keeping Civil Disputes Out of the Courts," *N. Y. Times*, Jan. 13, 1918; also, *Jour. Amer. Judic. Soc.*, IV, 165-168 (Apr., 1921); *ibid.*, VII, 7-14 (June, 1923); *ibid.*, VIII, 247-257 (June, 1924); *ibid.*, IX, 57-60 (Aug., 1925); *ibid.*, IX, 67-95 (Oct., 1925); *ibid.*, X, 122-126 Dec., 1926); *ibid.*, XI, 85-93 (Oct., 1927); *Amer. Arbit. Assoc., Year Book on Commercial Arbitration* (New York, 1927). *Literary Digest*, LXXXII (Sept. 6, 1924), 42-44; *Amer. Polit. Sci. Rev.*, XVIII, 760-772 (Nov., 1924).

² In 1925 Congress passed an act making "valid and enforceable written provisions or agreements for arbitration of disputes" in foreign or interstate commerce, except those involving seamen, railway employees, and other workers in interstate and foreign commerce. See "The United States Arbitration Law and Its Application," *Amer. Bar Assoc. Jour.*, XI, 153-156 (Mar., 1925).

- A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), I, 500-502, 508-510; II, 260-262, 268-270; III, 394-397. CHAP. XLI
- C. N. Callender, *American Courts—Their Organization and Procedure* (New York, 1927).
- J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chap. XLII.
- S. E. Baldwin, *The American Judiciary* (New York, 1905), Chaps. VIII-XXV.
- F. N. Judson, *The Judiciary and the People* (New Haven, 1913), Chaps. iv-v.
- E. Smith, *Criminal Law in the United States* (New York, 1910), Chap. VII.
- W. S. Carpenter, *Judicial Tenure in the United States* (New Haven, 1918), Chaps. III-IV.
- M. Storey, *Reform of Legal Procedure* (New Haven, 1911).
- J. D. Works, *Juridical Reform* (New York, 1919).
- G. W. Alger, *The Old Law and the New Order* (Boston, 1913), Chaps. II, III, V, VI.
- A. A. Bruce, *The American Judge* (New York, 1924). See review of this volume in *New Republic*, XXXVIII, 236-238 (Apr. 23, 1924).
- Kentucky Efficiency Commission, *The Judiciary of Kentucky* (Frankfort, 1923).
- J. F. Ailshee, "As the People See Courts of Justice," *Jour. Amer. Judic. Soc.*, VIII, 267-270 (June, 1924).
- C. E. Merriam, *American Political Ideas, 1865-1917* (New York, 1920), Chaps. V-VI.
- A. B. Hall, *Popular Government* (New York, 1921), Chaps. VII-VIII.
- Annals of Amer. Acad. Polit. and Soc. Sci.*, LII, 1-223 (Mar., 1914); LXXIII, 1-230 (Sept., 1917). Series of articles on judicial reform.
- C. P. Patterson, "The Courts of the Southwest," *Southwestern Polit. Sci. Quar.*, III, 77-99 (Sept., 1922).
- H. Feis, "The Kansas Court of Industrial Relations—Its Spokesmen, Its Record," *Quar. Jour. Econ.*, XXXVII, 705-733 (Aug., 1923).
- R. Pound, "Bibliography on Procedural Reform, Including Reorganization of Courts," *Annals Amer. Acad. Polit. and Soc. Sci.*, LXXIII, 90-103 (Sept., 1917).
- R. H. Smith, *Justice and the Poor* (New York, 1919).
- J. M. Maguire, "Poverty and Civil Litigation," *Harvard Law Rev.*, XXXVI, 361-404 (Feb., 1923).
- R. H. Smith and J. S. Bradway, "The Growth of Legal Aid Work in the United States," *Bull. U. S. Bur. of Labor Statistics*, No. 398 (Jan., 1926).
- R. Moley, *The Administration of Criminal Justice in Missouri—A Summary of the Missouri Crime Survey* (Pamphlet, St. Louis, 1926).
- Report of the Commission for the Reform of Criminal Procedure to the [California] Legislature* (1927).

CHAPTER XLII

THE PARTY SYSTEM IN THE STATES

National
party lines
in state
government

The principal executive officers and members of the legislature in practically all of the states, as well as a large majority of the judges, are nominated and elected as members of one or another of the two or three great national political parties which together have the support of probably nine-tenths of the voters of the country; and most of the elective county, city, and local officers are chosen in a similar manner.

To many people this projection of national party lines into the field of state and local politics seems not only illogical but inexplicable, unjustifiable, and responsible for much of the inefficiency of state and local governments. And it has to be admitted that it is not always easy to perceive any logical connection between the conduct of state, county, and municipal government and Republican and Democratic policies relating to national affairs. Administrative consolidation, budgetary and tax reform, reorganization of state judicial systems, the form and activities of city governments—these and other issues appear to have not the remotest connection with Republican, Democratic, or Socialist views on the currency, the tariff, the relations of the United States with Mexico or with the League of Nations, or with the question of government ownership and operation of railroads or other public utilities. Moreover, looking about, one may find plenty of cities in which local officials are sitting harmoniously around the council-table and efficiently administering the fire, police, health, educational, and other activities of their local governments, despite the fact that on such national issues as have just been mentioned they entertain the most widely divergent views. So far as their city's affairs are concerned, these officials appear to find the term Republican, Democrat, or Socialist quite irrelevant, if not altogether meaningless. How, then, is to be justified, or at least explained, this presence of the great national party organizations, not only as active, but usually as dominant, forces in state and local politics?

An explanation, although it may not be an adequate justifica-

tion, is not far to seek. In the first place, the importance of the national government, the far-reaching significance of national party issues, the exalted position of the presidency, the dramatic and often spectacular methods employed in national campaigns, and the varied and fervent appeals to the electorate combine to rouse a keener interest and to stimulate a larger participation in national, than in purely local and state, elections. To the national party with which the ordinary citizen becomes identified in such campaigns there soon springs up a permanent attachment, an abiding loyalty, a zealous devotion, against which purely local or state parties rarely have found it possible to prevail. Secondly, regarded from the viewpoint of national party leaders, the maintenance of national party organizations as active participants in state and local elections is a preparedness measure for the great presidential battles occurring once in four years and also for the hardly less important congressional campaigns occurring midway between presidential elections. Inasmuch as the states constitute the basic units for the election of these national officers, state political organizations inevitably form the basic units in the national party system. State and local officers also are often elected concurrently with national officers, as well as in the intervals between national elections; hence, national party activity in connection with the nomination and election of state and local officers serves to keep the national organization more alert and active, recruited more nearly up to its maximum strength, the different parts better articulated and running more smoothly, than if it were called into service only once in two or four years. Moreover, a steadily increasing proportion of people in most states now live in cities; hence, from the point of view of party leaders at least, the party's chances of winning the great national campaigns will be materially enhanced if the national organization can maintain from year to year in every important city well-organized units led by veterans trained in local political skirmishes.

Finally, a partial justification for national party activity in state and local governments is to be found in the fact that many of our most serious municipal problems, such as poverty, unemployment, child labor, high cost of living, physical degeneracy, water supply, sewage disposal, and especially the immigration, naturalization, and Americanization of aliens, cannot be solved—indeed the solution of some of them can scarcely be even commenced—by cities without the coöperation of both state and

CHAP.
XLIII

Explan-
ation of
national
party
activity in
the states

Interrela-
tion of
national
and local
problems

national governments, which really means the coöperation of national political parties.¹ A noteworthy and highly commendable tendency has appeared in some parts of the country in recent years for national party organizations to include in their state platforms definite declarations or programs concerning important problems primarily of state and local interest or concern. Wherever this is done in good faith, the terms Republican, Democrat, Socialist, come to have a real significance apart from their national connotations.

Notwithstanding this explanation and partial justification, many people are convinced that the existence of national party lines in state and local politics has been productive of more evil than good, and that, in particular, it has been largely to blame for the existence in many populous communities of unscrupulous and corrupt political machines masquerading under the name Republican or Democrat. To such proportions has this feeling grown in the past two decades that numerous efforts have been made to divorce national and state party activities. Many states now have some provision for holding state and local elections, so far as practicable, in the intervals between national elections, in the hope that local issues will thus be determined solely upon their own merits, unclouded by national considerations, even though the state officials continue to be elected as Republicans, Democrats, or Socialists. Another step in the same direction has been the adoption of the non-partisan ballot, *i.e.*, a ballot bearing no indication of the party affiliations of candidates, for the nomination and election of many city and county officers, judges of municipal or state courts, some of the principal state executive officials, and members of the legislature in two states.²

¹C. A. Beard, "Politics and City Government," *Nat. Mun. Rev.*, VI, 201-206 (Mar., 1917); M. D. Hull, "The Non-Partisan Ballot in Municipal Elections," *ibid.*, VI, 219-223 (Mar., 1917); M. R. Maltbie, "Municipal Political Parties," *Nat. Mun. League Proceedings*, VI, 226-238 (1900); W. B. Munro, *Government of American Cities* (3rd ed.), Chap. xiv, and *Municipal Government and Administration*, I, Chap. xv; M. Storey, *Problems of Today* (Boston, 1920), Chap. I.

²Since 1913 the members of the Minnesota legislature have been elected by non-partisan ballots. In 1923, the North Dakota legislature enacted a bill for non-partisan election of members of the legislature, and also the chief executive officers of the state, but this was vetoed by popular referendum in 1924. County officials in North Dakota have been chosen in non-partisan elections since 1919. In California all county and city officials have also been elected on non-partisan lines since 1910. In other states, the principal officials in cities having commission or commission-manager government are, in most instances, similarly chosen, although an exception may be noted in the third-class commission-governed cities of Pennsylvania. North Dakota and Cali-

Wherever the non-partisan ballot has been adopted it has been generally assumed by its advocates that the influence of national party organizations will be entirely eliminated from elections on the new basis, or at any rate reduced to a minimum. In many instances this has turned out to be the result, especially in relatively small communities. But in large cities or states having highly organized national party machines operating the year round the outcome has been, and is quite likely to be, entirely different. In such places removal of party designations from the ballot does not ensure genuine non-partisan elections, and sometimes it facilitates secret and irresponsible combinations to an even greater degree than in frankly partisan elections. Each political organization is almost certain to have its favorites upon the non-partisan ballot, in which case word is passed around, sometimes publicly, at other times in whispers, that such and such men are the "organization" candidates, and they receive partisan support to almost the same extent as candidates who publicly bear the party label.¹ Too great hopes of regenerating state and municipal politics must not, therefore, be staked upon the mere removal of national party labels from the ballot. It should also be remembered that while the Democratic or Republican label may not signify much in state or local elections, these labels do give the ordinary voter some idea of the forces or organizations behind a candidate; whereas, with a non-partisan ballot he may be left quite in the dark. Obviously, a poor clue under such circumstances is of greater assistance to intelligent voting than none.

Having thus seen something of the nature of the political organizations that are instrumental in placing most of our state and local officials in office, we may turn attention to (1) the methods by which candidates are brought forward, or nominated; (2) the series of committees which constitute the state party

for California also have non-partisan election of judges. Iowa and Pennsylvania tried this, but after a few years restored partisan judicial elections. In 1915 the voters of California rejected a proposed constitutional amendment providing for the non-partisan election of all elective state officers. Governor Hiram Johnson's message to the legislature recommending this measure is summarized in *Amer. Polit. Sci. Rev.*, IX, 313-315 (May, 1915). In November, 1924, a similar proposal was rejected in Nebraska by a vote of 228,485 to 163,832; see *Nat. Mun. Rev.*, XIV, 59-60 (Jan., 1925). Cf. R. E. Cushman, "Non-Partisan Nominations and Elections," *Annals of Amer. Acad. Polit. and Soc. Sci.*, CVI, 85-96 (Mar., 1923).

¹ This regularly happened in the "non-partisan" election of judges in Pennsylvania in 1913-1921. See V. Rosewater, "Omaha's Experience with Commission Government," *Nat. Mun. Rev.*, X, 281-286 (May, 1921); D. Stoffer, "Parties in Non-Partisan Boston," *ibid.*, XII, 83-89 (Feb., 1923).

CHAP.
XLII

Spurious
"non-par-
tisan"
elections

Important
aspects of
the state
party
system:

machinery; (3) the activities carried on by these committees; (4) the sources whence comes the money necessary to sustain these activities, and the laws which have been enacted to regulate the use of money in political campaigns; (5) the conduct of elections; (6) the qualifications and prerequisites for participation in elections; and (7) methods of enforcing a due sense of responsibility on the part of public officials to the electorate.

The earliest systematic methods of nominating candidates for the principal state executive offices and for representatives in Congress took the form of legislative caucuses. In days when means of travel and communication were greatly restricted, it was extremely difficult to bring together party representatives from all sections of the state for the sole purpose of nominating candidates for public office. The sessions of the legislature, however, assembled a considerable number of political leaders from all parts of the state, and by the opening of the nineteenth century it had become customary for each party delegation in the legislature to meet in a caucus for the purpose of deciding upon a list of candidates to be "recommended" to the voters for their support at an approaching election. Often, however, a party did not have representatives in the legislature from certain parts of the state, and in order that such districts might have a voice, the practice developed of inviting to the caucus persons who could express the sentiment of the voters in the otherwise unrepresented districts. To the caucus thus reënforced was given the name "mixed" legislative caucus.

But before this system became firmly established, candidates for local offices in townships and cities were often nominated by more or less informal, and sometimes secret, meetings of party leaders which were also called caucuses. Frequently these groups appointed some of their number to confer with representatives of other similar caucuses with respect to the nomination of candidates for county offices or for offices of larger districts; and this custom soon developed into a systematic selection of delegates in local caucuses, according to some fixed plan of representation, to attend a formal county nominating convention.¹ In time, state nominating conventions, closely modeled upon the county conventions, supplanted the legislative caucuses in the nomination of state and

¹G. D. Luetscher, *Early Political Machinery in the United States* (Philadelphia, 1903), Chaps. III-IV; J. S. Walton, "Nominating Conventions in Pennsylvania," *Amer. Hist. Rev.*, II, 262-278 (Jan., 1897).

congressional candidates. By 1830, and for upwards of eighty years thereafter, the convention system was the practically universal device employed for the selection of party candidates for all offices above those of the township or other subordinate political subdivision of the state.¹

CHAP.
XLII

At its advent the convention system was hailed as a marked improvement upon earlier nominating methods, as indeed it was. It was almost universally approved because it applied to the selection of party candidates the principle of representation that had long been employed in state and local governments. Theoretically, the voice of each voter could be transmitted from delegate to delegate until it found expression in the party's duly chosen nominees for the legislature and for the executive and judicial offices. And to this day party leaders, as a rule, look upon the convention system as the ideal mode of selecting candidates. In their eyes it furnishes an unexcelled opportunity for perfecting their party organization, for estimating the party's strength in various portions of the state or district concerned, for judging of the popularity of rival aspirants for nomination, for arousing party enthusiasm, for conciliating factions by agreeing upon "balanced" or compromise tickets, and for formulating party platforms.

Arguments
for the
system

However admirable in theory, the convention system in practice was soon found to afford little or no protection against boss or machine control of nominations. In many states, men who represented the best type of citizenship were seldom chosen as delegates; and when chosen, they often turned their credentials over to "proxies" named by party or factional leaders. Conventions became the "market-places of politics," where political "trades" were consummated, by the purchase, sale, or transfer of delegates from one candidate to another; convention proceedings were often marred by serious disorder and fraudulent practices; and in the larger states the system became so complicated that ordinary voters were unable to exert any appreciable influence upon the selection of the candidates put forward by their party. Chiefly for these reasons, a few states—notably New York and Indiana—have restricted the operations of the convention system to the nomination of candidates for the principal state offices. Since about 1903,

The
system's
decline

¹ For a fuller discussion of the rise and defects of the convention system, see M. Ostrogorski, *Democracy and the Party System* (New York, 1910), Chaps. II-V, VII; E. C. Meyer, *Nominating Systems* (New York, 1902), Pt. I, Chap. V; F. W. Dallinger, *Nominations for Elective Offices in the United States* (New York, 1897).

however, the great majority of states have abolished the system outright, not only for congressional and state officers, but also for county and municipal positions.¹ In its place, the direct primary election system has been adopted, in one form or another, in all but three states.²

Under the direct primary method, candidates are nominated directly by the voters of each party, instead of indirectly through representatives called delegates. The primaries of the different parties are usually held on the same day, and at the place where the regular elections are held later on; they are presided over by the regular election officials, and are surrounded by practically all the formalities and safeguards attending a regular election; hence, the appropriateness of the full name for this system, *direct primary election*.³ The ballots are generally printed at public expense and are usually of uniform size and shape. In some states the ballots of all parties are printed on paper of the same color, while in others *e.g.*, New York, paper of a different color for each party is used. Aspirants for a party nomination to any office, as a rule, get their names printed on the primary ballot by filing petitions signed by a specified number of qualified voters, the number being roughly proportioned to the importance of the office sought and varying all the way from one-half of one per cent of the qualified voters up to ten per cent. Usually a candidate who receives the highest number of votes for a given office is declared to be the party nominee for that office, although where there are three or more aspirants for the same office this may result in nomination by less than a majority. Five southern states require a majority vote to

¹In fifty or more cities candidates for municipal offices are nominated by the simple method of filing a petition signed by a specified number of qualified voters. This system is found in San Francisco, Cleveland, Boston, Pittsburgh, and a number of New Jersey cities.

²Connecticut, Rhode Island, and New Mexico. In April, 1925, the legislature of Colorado voted to repeal the direct primary law, but the measure was vetoed.

³A digest of state primary laws and a series of articles discussing the merits and shortcomings of the direct primary, especially its operation in a number of important states, are to be found in *Annals Amer. Acad. of Polit. and Soc. Sci.*, CVI (Mar., 1923). See also C. E. Merriam, *Primary Elections* (1908); O. C. Hormell, *Cost of Primaries and Elections in Maine* (Brunswick, 1926); *Congressional Digest*, V, 255-286 (Oct., 1926), series of articles on "Is the Direct Primary System Sound?"; L. Overacker, "Direct Primary vs. Convention System," *Amer. Federationist*, XXXIV, 541-545 (May, 1927); A. J. Beveridge, "Of, By, and For the People—Yes or No?" *Sat. Eve. Post*, CXCI, Dec. 11, 1926, pp. 8 ff.; Dec. 18, 1926, pp. 14 ff.; "The Direct Primary—Success or Failure?" *Transactions Common. Club of Cal.*, XIX, 553-664 (Dec., 1924); and for further references, P. O. Ray, *Introduction to Political Parties and Practical Politics* (3rd ed.), Chap. VI and pp. 545-551.

nominate;¹ if no candidate obtains a majority in the primary, a second, or "run-off," primary is held in which only the two highest candidates are voted for.²

CHAP.
XLII

The right to participate in making party nominations is commonly restricted by law to persons who are able to comply with some kind of a test of party allegiance. Such primaries are called "closed" primaries, to distinguish them from the "open" primaries found in Wisconsin and Montana, where no attempt is made to prevent Democrats from taking a hand in Republican nominations, and vice versa. A number of other states, however, in reality have the open primary, because the tests which they lay down are quite ineffectual in preventing voters from shifting temporarily from one party to another. The most effective means of preventing this practice, called "raiding," are to be found in those states which, like New York, require the formal registration or enrollment of the members of each party previous to the day of a primary. At the time of enrollment, various tests are applied to determine the right of voters to register as Republicans or as Democrats, as the case may be; and at the ensuing primary no one is allowed to vote whose name does not appear upon the respective party voting lists.

"Open" and
"closed"
primaries

From what has just been said, it will be seen that the direct primary usually presupposes the existence and activity of national party organizations in state and local nominations. Where, however, non-partisan elections have been adopted, they are usually preceded by a "non-partisan" primary conducted in practically all respects like an ordinary party primary, except that the ballots carry no indication of the party affiliations of the candidates, and no attempt is made to inquire into the party preferences of those who wish to participate in naming the "non-partisan" candidates. Non-partisan primaries may even be held at the same time and place, in which case separate ballots are prepared for the two kinds of nominations. In any event, the two candidates on the non-partisan ticket polling the highest number of votes for each office

"Non-par-
tisan"
primaries

¹ Georgia, Louisiana, Mississippi, South Carolina, and Texas.

² In Tennessee also a run-off primary is authorized in the case of a tie vote. In order to approximate majority nominations, a number of states have tried the preferential system of voting, under which each voter is given an opportunity to express his first, second, and sometimes his third, choice among the candidates. This system is now used in connection with primaries only in Florida and Alabama. In Iowa, if none of the candidates for a given office receives thirty-five per cent of the total party vote in the primary, the selection of a candidate for that office is left to the action of a delegate convention.

have their names printed upon the official ballot used at the ensuing election, where party designations are again entirely absent. In most places, the non-partisan primary thus becomes "a sort of qualifying heat which eliminates the weaker contestants from the final race," and ensures election by a majority, rather than a mere plurality, of the vote polled.¹

The direct primary method for the selection of party candidates unquestionably gives the rank and file of the party a much more direct and decisive influence in determining nominations than was possible when candidates were picked by delegate conventions. Beyond this point, the supporters and opponents of the direct primary hold widely varying, even conflicting, views concerning its superiority over the convention system. The former argue that it brings to the polls on primary day a much larger proportion of the voters than took the trouble to come out merely to vote for delegates under the old system; that it has materially weakened machine control of nominations; that it affords at least an opportunity to bring forward better candidates, at all events a better chance to defeat conspicuously unfit ones; and that corruption, which often was a decisive factor in determining the selection of candidates by a convention, is robbed of most of its potency. Opponents of the direct primary, on the other hand, are in the habit of denying outright most of these claims, and of asserting that the direct primary has produced no better officials, favors wealthy aspirants for nomination, leads to increased taxation, involves greater expense to candidates generally, weakens the party organizations, destroys or impairs party responsibility, intensifies machine control, multiplies the number of candidates, and favors populous centers at the expense of rural sections of the state.

Most of the issues thus raised are merely matters of opinion and therefore cannot be disposed of dogmatically and finally. With widely diverse laws, results under the direct primary have naturally varied from state to state, and even from time to time and place to place within the same state. The only fair standard, therefore, by which to appraise the system is by comparing results under it, state by state, with conditions which prevailed in the

¹ In the Chicago non-partisan aldermanic primaries a candidate who receives a clear majority of the votes cast in his ward is declared elected. In California, under a constitutional amendment adopted in 1926, candidates for judicial, school, county, township, or other non-partisan offices receiving a majority of all the ballots cast for such office in a primary are declared elected.

same states under the convention system. Whatever the conclusions arrived at after such a comparison, the old convention system is so thoroughly discredited that the friends of the direct primary, while conceding its imperfections, are fully justified in their unalterable opposition to the restoration of the *unreformed* convention system. They cannot fairly be asked to discard the new method and return to the old until workable devices and effective safeguards are provided against the recurrence of the notorious evils connected with the convention system. That the direct primary is not all that it should be, or might become, will readily be conceded. But it should be pointed out that perhaps its chief shortcomings lie in the fact that direct primary laws fail to take into account the fact that democracy needs leadership, and neglect to provide for a leadership that is at once public, official, and responsible. Until guidance of this sort supplants the more or less secret, unofficial, and irresponsible leadership that has sprung up in most of our states and large cities, and until the number of offices for which popular nominations have to be made is greatly reduced, the best results logically to be expected from the direct primary will never be attained.

CHAP.
XLII

The frequent allusion to primary laws in the preceding paragraphs deserves a word of emphasis; for the appearance of statutes regulating nominating procedure is a fact which in itself reflects a marked change in the public attitude toward parties in general, and especially toward the methods by which they select their candidates for office. Until comparatively recent years, party nominations were looked upon as matters in which the public had no legitimate concern, and consequently the convention system grew to maturity almost wholly unregulated by law. Parties were regarded as private organizations, and the way in which they chose their candidates was considered a private affair with which the legislature had no right to meddle.¹ Now, however, the nomination of candidates is rightly regarded as quite as important a public function as their actual election to office and, therefore, as falling within the field of legitimate state regulation. And this is especially true in "one-party" states, where a nomination at the hands of the dominant party is usually equivalent to election.² Political parties are no longer looked upon as private organizations, but as public institutions whose activities in other respects

New view
of legal
status of
parties

¹ C. E. Merriam, *American Political Ideas, 1865-1917*, pp. 278-288.

² *E.g.*, Pennsylvania, Vermont, California, and the southern states.

than nominations may also be controlled by law; so that now one finds in most states laws which regulate almost every phase of party activity, including the structure and functions of what is commonly called party machinery and the raising and expenditure of money in connection with political campaigns. Both of these matters call for some comment at this point.

The machinery of the two leading national parties consists of a complicated network of committees extending over the entire country and ramifying into every community. Such of these committees as make it their main business to promote the nomination and election of officers of the national government have been described in an earlier chapter.¹ They, however, depend very largely for their success upon the efficiency of the much greater number of committees which make up the more continuously active state party organization.

In every state the two major parties, and in some states minor parties as well, maintain a central committee which serves as the head of the state party organization.² In size, composition, and powers these central committees vary greatly, as also do the subordinate committees about to be mentioned. Such matters are now regulated by law in most states;³ but in the absence of law, party rules govern. Members of the state central committee represent the various counties, or legislative or congressional districts, of the state, and are either elected directly by the party voters or chosen by delegate conventions. The committee usually elects its own officers, including a chairman (who may or may not be the real head of the state organization), a secretary, a treasurer, an executive committee, and any other committees that may be needed. When the convention system held undisputed sway, the state central committee, or an inner group, often exerted decisive influence upon the action of the state convention in selecting candidates. But in states that have adopted the direct primary the committee's influence upon nominations has declined, or at all events has become much less conspicuous and decisive. Nowadays the committee's energies are concentrated upon the election of the national and state party tickets and the maintenance of an efficient party organization throughout the state between elections. Occasionally,

¹ See Chap. XXXII.

² C. E. Merriam, "State Central Committees," *Polit. Sci. Quar.*, XIX, 224-233 (June, 1904).

³ A tabulation of these laws is given in *Annals of Amer. Acad. of Polit. and Soc. Sci.*, CVI, 222-232 (Mar., 1923).

too, the committee is empowered to formulate the state party platform.

CHAP.
XLII

Subordinate to the state central committee, and operating in a more restricted sphere, are similarly constituted committees in nearly every congressional, legislative, or senatorial district of the state. Sometimes these committees are made up almost wholly of *ex-officio* members, such as the chairmen of the county committees within the district. Of more importance, however, are the county central committees, found in practically every county, and the city central committees, found in almost all cities and especially influential in the largest municipalities. Almost every city ward and voting precinct also has its dual or triple set of party committees; and the same is true of nearly every village and township. Members of the county central committee and of the other local committees are usually elected directly by the party voters in the subdivision concerned. Originally, all of these committees consisted exclusively of male voters. But with the adoption of woman suffrage, many committees have expanded their membership so as to admit women voters, while in other instances the hierarchy of men's committees is rapidly being paralleled with a series of women's committees.¹

Subordi-
nate com-
mittees

It should, of course, be made clear that the party machinery here described is fundamentally a different thing from the political "machines" of which we often hear. The real party machinery or organization is the foregoing series of committees, ramifying throughout the state. Every state, county, and other local subdivision has its party machinery in this sense; happily, some states and many counties and smaller communities are without any political "machine." In the larger cities, on the other hand, the series of committees is sometimes identical with, or at least controlled by, a local "machine," in which case it is not inaccurate to use the terms machine and party organization interchangeably. Thus, the Tammany machine is the Democratic organization in New York County, and the Republican machine in Philadelphia is the Republican organization of that city. Sometimes the party organization for an entire state becomes a "state machine." Thus there has been a "Hill machine" controlling the Democratic state organization in New York, and a "Quay machine" and a "Penrose machine" similarly dominant in the Republican state organization

Party ma-
chinery and
political
"machines"

¹ See *Sat. Eve. Post*, CXCVIII, July 18, 1925, pp. 6 ff., "Are Women Counting in Politics?"

of Pennsylvania. Usually, however, the term "machine" applies to some smaller area and some lesser group of politicians, so that it is possible to find several "machines" within the same party in a single state. On the other hand, there is ordinarily only one Democratic or Republican organization for a state. Furthermore, the motives of persons in control of a machine are apt to differ from those animating the leaders of the real party organization; the latter, as a rule, seek primarily to promote the interests and success of the party as a whole, whereas the members of a machine often subordinate party interests to their own personal advantage, and are even ready secretly to sacrifice the party if thereby some important benefit may be secured for the machine.¹

The activities of the committees which constitute the party organization or machinery sometimes begin long in advance of the primaries or conventions in which candidates are nominated, with a view to bringing about the nomination of an "organization slate," or ticket of candidates favored by those in control of a given committee or series of committees. The greater part of the committees' work, however, relates, directly or indirectly, to the conduct of the "campaign" which begins shortly after nominations are made. In presidential campaigns all these committees coöperate closely with their respective national party organizations. Their efforts are directed toward arousing interest in, and enthusiasm for, the party ticket among the rank and file of party members; they call meetings of local party workers; they direct "rallies" and "demonstrations"; they attend to the enrollment of new voters and the naturalization of aliens; they instruct voters about registration formalities, the location of polling places, and the form of the ballot; they endeavor to bring home to the voters the claims of the party and of individual candidates;² they are expected to raise money for use in their respective districts, to employ speakers whenever possible, and to distribute campaign literature furnished by the national organization; they appoint party watchers to serve at the polls on election day, and often virtually appoint the other election officials; they assist in conducting canvasses of voters before

¹ P. O. Ray, *Introduction to Political Parties and Practical Politics* (3rd ed.), Chap. xvi.

² A few states have laws which require the printing and mailing to every voter before primaries and elections of "publicity pamphlets" in which are to be found statements by the various party committees or candidates bearing upon their respective claims to favorable consideration.

important elections; they take great pains to get out the full party vote and to ensure a fair count of the ballots cast.

CHAP.
XLII

4. Party
finance

The maintenance of party headquarters during campaigns and often, in the larger communities, throughout the year, the employment of organizers and other workers to make canvasses and assist in getting voters to the polls, expenses connected with the holding of political meetings, the compensation of speakers, and the publication and distribution of campaign literature entail the raising and spending of large sums of money in every warmly contested election, the amounts required increasing, of course, with the number of voters to be reached. The greatly augmented sum spent in political campaigning in recent years has resulted in a large output of laws relating to party finance, most of them designed to restrict in various ways the use of money in connection with primaries and elections. These laws, together with others that have long been on the statute-book, are commonly referred to collectively as corrupt practices acts.¹ Although they cover a wide range of subjects, they fall roughly into four main classes. (1) Corrupt practices acts, using the term in a restricted sense, are found in all states, and their purpose is to prevent or punish infractions of the election laws, especially bribery and treating, intimidation of voters, personating voters, stuffing ballot-boxes, and a number of other practices not directly involving the use of money. (2) Other laws seek to restrict the sources of party campaign funds by prohibiting contributions from corporations, by forbidding the assessment of office-holders and public employees, and by limiting the amounts that may be solicited from candidates. (3) Still other very numerous laws place restrictions upon the amounts which candidates and party organizations may spend in quest of votes. Some of these laws forbid candidates to spend more than a certain fixed sum, varying with the importance of the office, or more than a certain percentage of the salary attached to the office. Others limit the aggregate expenditures by political committees to a stated amount for each vote cast at the last preceding general election. In still other instances, unlimited expenditures are permitted for certain definitely enumerated purposes, expenditures for any other purposes being, by implication at least, prohibited. (4) Lastly, there are both national and state laws which require the publication, either before or after a primary or an election, of the names of contributors and the amounts contributed by each person to any

Regulatory
legislation

¹ On the federal corrupt practices laws see pp. 641-642.

party campaign fund; and also requiring the filing of a detailed statement, under oath, of the amounts expended by candidates or committees and the object of such expenditures. On the whole, these various laws have not proved very effectual in reducing the amounts expended in legitimate ways; nor have they entirely eliminated illegitimate expenditures.¹ These and other problems connected with party finance are, therefore, still far from a final or satisfactory solution.

In discussing nominating processes, party committees, and party finance, frequent mention has been made of the voters, or the electorate. Who are the voters? Who constitute the electorate, to influence whom such elaborate and costly organization and methods seem to be necessary? Every state answers this question for itself, and usually the answer may be found in an article in the state constitution dealing with the suffrage. If a state is disposed to be generous, even to the point of prodigality, in conferring indiscriminately the privilege of voting upon men, women, and children, there is nothing in the national constitution or laws to prevent. If, on the other hand, a state desires to confine the voting privilege to a restricted class, care must be taken that no citizens of the United States are discriminated against on account of race, color, or previous condition of servitude, or on account of sex; for discriminations on any of these grounds are definitely forbidden in the national constitution.² In all other respects, however, the states are given a perfectly free hand in laying down their suffrage requirements.³

The history of suffrage regulations has been so fully outlined in an earlier chapter⁴ that it is sufficient to observe here that all states now have systems falling not far short of universal suffrage for citizens of the United States who are at least twenty-one years of age and have resided within a given state for one year, or some other stipulated period, and within their home county and election precinct for a somewhat shorter length of time. Formerly, the common requirement that, in order to vote, an elector must appear in person at his proper polling place in his home precinct on primary or election days in effect disfranchised thousands of voters who were detained from the polls by illness or accident, or

¹ For a fuller discussion of corrupt practices acts see P. O. Ray, *An Introduction to Political Parties and Practical Politics* (3rd ed.), Chap. XI.

² Amendments XV and XIX.

³ K. H. Porter, *A History of Suffrage in the United States* (Chicago, 1919).

⁴ Chap. XXXI.

whose business required them to be away from home at the time when an election was being held. The rapid spread of absent-voting laws since 1911, however, has done much to remedy this injustice by making it possible for certain classes of absentees to cast their ballots *in absentia* or before leaving home. All but three of the states now have such laws.¹

CHAP.
XLII

Every state prescribes by law the way in which citizens who possess the voting qualifications may have their names placed upon the official voting-list used in primaries and elections; and persons who are not thus "registered" are not permitted to vote unless they comply with certain additional formalities set forth in the law. The preparation of voting-lists is commonly managed by some county official or by the county board, although in large cities, in many counties, and in a few states, there are special city, county, or state election boards that attend to such matters and perform other election duties. Most states have a partial or complete system of personal registration, so-called from the fact that each voter must appear in person before the registration officials and prove his right to vote. In some states such personal registration may be made once for all; having once established his right to vote, the voter knows that his name will remain on the voting list until his death, removal from the district, or disqualification for some other cause. In point of fact, it is not always removed even under these circumstances. In most cities, however, periodical registration is required, annually or biennially.² Under either system the work of registration is performed, as a rule, at the precinct polling places

Registration
of
voters

¹ These are Connecticut, Rhode Island, and Kentucky. An absent-voting law was passed in Kentucky in 1918, but was held by the state supreme court to be unconstitutional. *Clark v. Nash*, *Lyon v. Nash*, 192 Ky., 594 (1921). A similar law adopted in Pennsylvania in 1923 was held unconstitutional by the state supreme court early in 1925. For summaries of absent-voting legislation see *Amer. Polit. Sci. Rev.*, VIII, 442-445 (Aug., 1914); X, 114-115 (Feb., 1916); XI, 116-117 (Feb., 1917); XI, 320-322 (May, 1917); XII, 251-261 (May, 1918); XII, 461-469 (Aug., 1918); XIII, 269-270 (May, 1919); XVI, 463 (Aug., 1922); XVIII, 321-325 (May, 1924); XX, 347-349 (May, 1926). See J. K. Pollock, Jr., "Absent-Voting, with Particular Reference to Ohio's Experience," *Nat. Mun. Rev.*, XV, 282-292 (May, 1926).

² On the "permanent" registration system in Minneapolis, see *Nat. Mun. Rev.*, XIII, 488-492 (Sept., 1924); in Milwaukee, *ibid.*, XIV, 603-609 (Oct., 1925); in Boston, *ibid.*, XV, 537-541 (Sept., 1926); in Omaha, *ibid.*, XV, 637-644 (Nov., 1926). Other useful articles on registration of voters are "F. H. Riter, "Permanent Registration for Elections Unsuitable for Large Cities," *ibid.*, XIV, 532-535 (Sept., 1925); J. P. Harris, "Registration for Voting in San Francisco," *ibid.*, XV, 212-218 (Apr., 1926); "A Model Registration System," *ibid.*, XVI, Supp., 45-86 (Jan., 1927); Chicago Bureau of Public Efficiency, *A Proposed System of Registering Voters and Convassing the Registration Lists in Chicago* (Pamphlet, 1923).

used on primary and election days; and it is almost always entrusted to the regular bi-partisan polling officials of the precinct, who in this way are supposed to become more familiar with the qualifications of the voters who will appear before them at the ensuing primary or election.

It is essential to a proper and efficient enforcement of registration and election laws that the officials charged with their administration be not only honest but intelligent and thoroughly familiar with the technical requirements of the law. Few states, however, have taken steps to ensure that this work shall be entrusted only to competent men of high repute. In some of the southern states the unscrupulous exercise of large discretionary powers by election registrars in applying educational and other tests to negro applicants for registration has resulted in disfranchising thousands of eligible negroes and in deterring other thousands from even applying for registration.¹ A thoroughgoing personal registration law should provide in detail, especially in cities, for a system of revising and purging registration lists prior to each primary or election. The need of this was brought out strikingly some years ago in Philadelphia, and more recently in Terre Haute, Indiana, where, in connection with the trial of the mayor and more than a hundred other local politicians, "one witness testified to the frequent registration of non-residents and of dead men, and in one case even of a pet dog. On election day these fraudulent registrations were voted on by hired repeaters and thugs."²

Probably no kind of literary matter is more unattractive to the

¹T. J. Jones, "Power of the Southern Election Registrar," *Outlook*, LXXXVII, 529-531 (Nov. 9, 1907). Some idea of the extent of negro disfranchisement may be obtained from the following facts: Louisiana, Mississippi, and Kansas have approximately the same population and representation in Congress; but in 1924 only 121,951 votes were cast in Louisiana and 112,463 in Mississippi, while in Kansas 662,451 votes were cast. In Mississippi more than half, and in Louisiana nearly half, the population is colored. Similarly, South Carolina and Arkansas have about the same population; but only 50,751 votes were cast in the former, and 138,532 in the latter, while in Connecticut, a somewhat smaller state, 401,033 votes were cast. The discrepancies are to be accounted for in some measure by the fact that Democrats, being assured of an easy victory, do not go to the polls in the southern states in the same proportion as in states where there is a real contest. But the main explanation is the practical disfranchisement of the negroes.

²S. C. Stimson, "The Terre Haute Election Trial," *Nat. Mun. Rev.*, V, 38-46 (Jan., 1916). Over four and a half million errors or omissions in the registration and poll books of the cities of New York were discovered in 1914 through the vigilance of the state superintendent of elections and his deputies. On fraudulent registration and repeating in New York City, see E. R. Finch, "The Fight for a Clean Ballot," *Independent*, LXVIII, 1020-1026 (May 12, 1910).

ordinary citizen than the laws which govern the conduct of elections. Invariably phrased with the traditional legal verbiage and circumlocutions, they make extremely slow and difficult reading. Moreover they include a maddening maze of minute regulations applying to every stage of the nominating and election process—matters of which the elector is only dimly conscious, if conscious at all, when he votes once or twice a year. The election laws of most states therefore make up rather sizeable volumes which few citizens ever have the courage to study. Nevertheless the character and provisions of these laws are matters of vital importance to citizens generally; for the ballot box is the only point at which most people can exercise any control over their government. However virtuous, public-spirited, conscientious, and well-intentioned a citizen may be when he goes to the polls, these good qualities or intentions may be rendered of no effect by poorly drawn and inadequate election laws, or by dishonest or incompetent officers, or by a long and confusing ballot. Such things, therefore, as the form of the ballot, the choice, qualifications, and duties of election officers—in fact, the provisions of election laws generally—are not to be passed over as the “mere mechanics” of popular government. They are, rather, matters which pertain to the very essence of such government.¹

CHAP.
XLII
Election
laws

Some of the main points covered by our election laws can best be summarized in connection with the work of the various election officers. Construed broadly, the term “election officers” covers three classes of officials: (1) those in charge of the preparations for an election; (2) those in charge of polling places during an election; and (3) canvassing and returning officials.

Election
officers

The first class includes (a) the persons who are in charge of the registration or enrollment of voters prior to primaries or elections, and (b) those who designate the polling places, mark out election districts, appoint polling officers, prepare sample and official ballots, advertise the time and place of elections, and provide the necessary equipment for polling places. It is very common to put these preliminaries, except the registration of voters, in the hands of county officials, such as boards of supervisors or county commissioners, or of special election boards, as in New York, Chicago,² and other large cities. Few people realize the magnitude

¹ See “Outline of an Improved Method of Conducting Elections,” *Nat. Mun. Rev.*, IX, 603-616 (Dec., 1921).

² J. G. Kerwin, “Electoral Administration in Chicago,” *Amer. Polit. Sci. Rev.*, XXI, 830-834 (Nov., 1927).

of the preparations which precede an election in a large city, or even in a populous county. In New York and Chicago, between two and three thousand polling places have to be arranged for; the boundaries of an equal number of voting precincts have to be marked out; from twelve to fifteen thousand polling officials have to be selected and appointed; arrangements have to be made for storing, hauling, setting up, and removing thousands of voting booths, curtains, guard-rails, and ballot boxes; all of the materials and supplies used at polling places—pens, ink, pencils, sealing-wax, candles, envelopes, poll-books, tally-sheets—have to be purchased and distributed; thousands of cards of instructions to voters and circulars of instruction to polling officers, and hundreds of thousands of sample and official ballots, have to be printed and sent to the proper places. Considering the haphazard way in which most election officials are chosen, the wonder is that the gigantic task is performed as honestly and efficiently as it is.

The second class of election officers comprises those who are in charge of polling places on primary and election days. Their number, titles, terms, and methods of selection vary from state to state. In the great majority of cases they are appointed on a bi-partisan basis, although in Pennsylvania they are elected by popular vote, a system which has proved very unsatisfactory. In New York one finds in every election precinct four inspectors of election, two poll clerks, and two ballot clerks, divided equally between the two principal parties. In Illinois there are three judges of election and two clerks in each polling place; and in Pennsylvania, one judge, two inspectors, and two clerks. In addition to these officials, party organizations or candidates regularly appoint a certain number of challengers or watchers, or both. Watchers are entitled to see everything that is done by the election officers both at the casting and the counting of the ballots. Challengers, as the name suggests, are present to prevent illegal voting. Police officers are also found in or near the polling places to maintain order, subject to the direction of the officials in charge.

The duties of polling officers are set forth in the election laws of the several states, and are essentially the same everywhere. These officers check and record the names of voters as they appear at the polls and have custody of the ballot boxes and the ballots. In some states they assist voters who are unable to mark their ballots unaided. They pass in the first instance upon challenges, and sometimes have special police powers. Aside from preparing

small circulars of instructions and distributing them a few hours before an election, few states make provision for securing well-qualified polling officials. Appointments in many places are distributed by local politicians among their friends as political favors and sometimes for sinister purposes, seldom with any regard to the technical requirements of the office. At one time New Jersey required persons nominated for polling positions by the county chairmen of the leading parties to pass examinations conducted in each county by the state civil service commission.¹ A wider adoption of some system of examination would tend to secure a fairer administration of the election laws and more accurate recording and determination of election results.

The third class of election officers includes canvassing and returning officials. When the polls close, the ballots are first counted, or canvassed, at the polling places by the officials in charge.² In some states, *e.g.*, New York, the counting is done publicly; in others it is done only in the presence of the polling officers. Tally-sheets are provided to facilitate the count, and are preserved as a part of the official record of the election. Upon the completion of the count, all ballots, used and unused, including spoiled and defective ones, together with the poll-books and tally-sheets, are placed in sealed packages or in sealed ballot-boxes; and all are carefully preserved and guarded for a specified period, after which the ballots are destroyed. In 1916 San Francisco adopted an interesting arrangement under which the counting of ballots is no longer performed at the polling place by officials who are more or less exhausted after a hard day's work. Instead, all ballot-boxes are conveyed at the close of the polls to the office of the registrar of voters in the city hall, and there, under his supervision, are publicly counted, precinct by precinct, by competent persons specially selected for the work.³ Several states, including Iowa, Kansas, Nebraska, New York, and West Virginia, have passed laws for the appointment of "double election boards"; one board, called the receiving board, attends to the delivery of ballots to the voters, checks voters' names, and has general charge of the polling place; the other, called the counting board, proceeds to the polling place

Canvassing
and return-
ing officers

Dual
election
boards

¹ This law, enacted in 1911, is no longer in force.

² See G. Mygatt, "Counting the City's Vote; How New York's Election Returns Come In," *Outlook*, CV, 535-541 (Nov. 8, 1913); A. M. Stoddart, "How the Newspapers Tell the Story of Election Day," *ibid.*, CXIV, 566-569 (Nov. 8, 1916).

³ In 1921 the right to adopt the central counting system was extended to all the cities and counties in California.

at a designated hour after the polls have opened, begins counting the ballots already cast, and remains at the task after the polls close until the count has been completed.¹

When the precinct results have been ascertained, "return blanks are made out in duplicate or triplicate, the proper election officer entering the exact number of votes received by each candidate and affixing his signature. One set is then sent off to the city or county clerk, or to the board of elections; another is transmitted to some higher canvassing body, *i.e.*, the county board of supervisors in California, the judges of the court of common pleas in Pennsylvania, the county clerk assisted by two justices of the peace of the county in Illinois, the board of election commissioners in most large cities. On a day fixed by law, these canvassing bodies in each county or city proceed to canvass the returns from the various precincts over which they have jurisdiction; that is to say, they add up the votes reported for each candidate from the different precincts. They then certify the result, so far as it concerns national and state offices, to some state official (usually the secretary of state) who is required to consolidate and transmit these returns to a state canvassing board. In New York the state canvassing board (as reorganized in 1927) is a bi-partisan body consisting of the attorney-general acting as chairman, two senators chosen by the senate, and two members of the assembly chosen by that body. In Illinois the board is made up of the governor, the secretary of state, the auditor, the treasurer, and the attorney-general. These state boards, in turn, add up and check over the results reported from the several counties. The last stage in the process is reached when the state and county canvassing boards file their reports with the officials designated by law, usually the county clerk in the case of county offices and the secretary of state in the case of state and national offices; whereupon these officials issue to each person declared to be elected a certificate of election which is *prima facie* evidence of the legal right of the person named therein to hold the office and perform the duties connected with it.

Such a certificate is not, however, conclusive; for all state election laws include detailed provisions for "contested elections," that is, for disputes arising when a defeated candidate alleges that he has been illegally denied a certificate of election. Such cases are commonly determined in the courts, although in some states,

¹L. McCarthy, "Counting Votes Before the Polls are Closed," *Amer. Polit. Sci. Rev.*, XIX, 784-788 (Nov., 1925).

as Illinois, the legislature is the authority which decides conflicting claims to the highest state offices. Where such contests involve the right to a seat in the state legislature or in a city council, the legislative house or the council concerned almost invariably has the power of decision.

CHAP.
XLII

Secrecy in voting is now everywhere provided for, either in the state constitution or by statutes; and it has been effectually ensured by the almost universal adoption of some form of the so-called Australian ballot during the past thirty years.¹ Ballots are no longer left to be printed and circulated by candidates or party organizations, as before 1890, but are almost universally prepared by responsible public officials at public expense, and in accordance with standard forms prescribed by law. Names of the candidates of all parties usually appear on a single sheet, except those of presidential electors, which are sometimes printed on separate ballots. Separate ballots are also commonly prepared for city offices whenever a city election occurs on the same day with a state or national election.

The ballot

The arrangement of the names of candidates on the ballot varies in different states but usually conforms to one or the other of two plans. In the party-column type of ballot, found in the majority of states, candidates of the different parties have their names printed in separate columns, at the head of which appears, in each case, the party name and a "party circle" or "party square." The voter has merely to place a single cross in this circle or square to ensure that his ballot will be counted for all the candidates of the given party. This obviously facilitates what is called "straight-ticket" voting, and accordingly the plan is regarded with high favor by party leaders. In Massachusetts, New York, and a number of other states, a different arrangement is employed. The names of candidates of all parties are grouped together under the titles of the offices for which they are running, the designation of

Principal
types of
ballots

¹ The Australian ballot is now used in all states except South Carolina. Georgia was the last state to adopt it (1922), but its use in any county there depends upon the favorable action of two successive grand juries. See E. C. Evans, *A History of the Australian Ballot System in the United States* (Chicago, 1917).

The use of voting machines, instead of paper ballots, is authorized by the laws of a number of states, although the substitution is usually left optional with the locality concerned. See T. D. Zukerman, *The Voting Machine—Its History, Use, and Advantages* (Pamphlet, New York, 1925); "The Case for Mechanical Voting," *Nat. Mun. Rev.*, XIV, 226-233 (Apr., 1925); *ibid.*, XIV, 185-186 (Mar., 1925); "The Voting Machine Extends Its Territory," *Amer. Polit. Sci. Rev.*, XXI, 603-610 (Aug., 1927).

the party to which each candidate belongs appearing alongside his name. There is no way of voting a straight party ticket with a single cross as in the party-column type of ballot; on the contrary, to vote a straight-ticket, a voter must place a cross opposite the name of every candidate of a given party. For this reason, the Massachusetts type of ballot, as this form is called, is said to favor independent, or "split-ticket," voting. Pennsylvania ballots retain the grouping of candidates by offices, as in Massachusetts, but also provide in the left-hand margin a list of the parties represented on the ballot; and a single cross placed opposite one of these party names is counted as a vote for every candidate nominated by that party—a device which, of course, makes straight-ticket voting quite as easy as where the party-column type of ballot is employed. Montana and a few other states, although retaining the party column for the guidance of voters, omit the party square or circle at the head of the column, so that there is no possibility of voting a straight ticket merely by making a single cross.

Few phases of our governmental system have been more severely criticized in recent years than our scheme of elections. The chief criticisms relate to the frequency of primaries and elections, the concurrence of local, state, and national elections, the large number of offices filled by popular election, and the almost universal rule of election by plurality vote. Each of these criticisms deserves at least brief consideration.

Concerning the frequency of elections, nothing more need be said than to call attention to the familiar fact that the election of president and vice-president and of certain important state officers occurs every four years; that some state officers are elected triennially, and others, along with congressmen and most county officers, biennially; that many county and local offices are filled annually; and that practically all of these elections are preceded by primaries or nominating conventions. Not only do these frequently recurring primaries and elections impose a heavy financial burden upon the taxpayers, but they make it impossible for the average preoccupied citizen to keep up an intelligent interest and to take an active part in the nomination and election of the men who in various ways act for him in the conduct of public affairs.

National, state, and local elections often fall on the same day, with the result that the names of candidates for offices of all three kinds, or at least for national and state offices, are printed on

the same ballot. This frequently results in a serious confusion of national with state and local issues, to the detriment of state and local government. A remedy has been sought in many states by arranging elections so that the most important state and local contests will be held in years in which presidential and congressional elections do not occur. Some states have not stopped here, but have also separated purely local from state elections. The latter divorce-ment may, however, easily be carried so far as unreasonably to increase the number of elections occurring in a single year, as has been done in Illinois.

Of far greater seriousness than either of the foregoing defects in our electoral system is the so-called long ballot, with which most voters are confronted when they go to the polls at presidential elections and at many state and local elections as well. The bewildering list of candidates to be voted on is accounted for partly by the number of offices now filled by popular election, partly by the coming together of national, state, and local elections, and partly by the fact that there are usually two or more candidates for every office to be filled. The result is that ballots bearing three hundred, and even more than four hundred, names are by no means uncommon. Certain serious consequences are entailed. For one thing, it is extremely difficult, if not impossible, for a majority, or even a considerable minority, of the voters to form an intelligent opinion of the merits of the candidates, especially when elections take place frequently. Consequently, there is a great amount of blind voting, especially in the form of straight-ticket voting. Another result is that the merits of only the candidates for a few principal offices are seriously considered, even by well-informed voters. Popular interest is usually concentrated upon candidates for president, governor, and mayor, to the almost complete neglect of the remainder of the ticket. At best, in other words, there is intelligent voting for a few prominent offices, and blind voting for the great majority of minor offices. Taking advantage of popular preoccupation with the most conspicuous offices, politicians are often able to get wholly unfit candidates into minor, though not unimportant, positions.¹

The remedy for much of this blind voting is to shorten the ballot by sharply reducing the number of elective officers. Officers

CHAP.
XLII

2. Concur-
rence of
national,
state, and
local
elections

3. The long
ballot

Need of
shortening
the ballot

¹R. S. Childs, *Short Ballot Principles* (New York, 1911); "The Short Ballot," *Outlook*, XCII, 635-639 (July 17, 1909); and "Ballot Reform; Need of Simplification," *Amer. Polit. Sci. Assoc. Proceedings*, VI, 65-71 (1909).

who have a share in translating public opinion into law, or who enjoy large discretionary powers in the administration of laws—in other words, all policy-determining officials—should continue to be elective. But there are very few of these. The president, the members of both branches of Congress, the governor and members of the legislature, and the mayor and members of the city council are obviously policy-determining officers. To a less extent, this is true of boards of county commissioners or county supervisors. But here the list ends. Practically no other officials have anything to do with the formulation of public policy in the field of either legislation or administration. On the contrary, their respective official duties are minutely set forth in the national or state constitution or statutes, or in the city charter and ordinances; so that all that they have to do is to study the laws relating to their positions, do what the laws require of them, and do it in the manner prescribed in the law. In other words, their duties are purely ministerial, involving practically no opportunity for the exercise of discretion or independent judgment. In this category fall such officers as secretary of state,¹ state engineer and surveyor, state superintendent of public instruction, state treasurer and comptroller, county auditors or comptrollers, sheriffs, county clerks and court clerks, city clerks and city treasurers, and a host of others whose candidacies now encumber our ballots. Choosing them by popular election yields no advantage which is not more than offset by the evils traceable to the resulting lengthening of the ballot. Moreover, the inability of the average citizen to attend to the work of selecting candidates for so many offices has been largely responsible for the rise of a class of professional politicians who make it their business to attend to precisely that sort of thing. Although it is customary to sneer at the political experts called professional politicians, they are nevertheless indispensable so long as we continue to identify multiplicity of elective offices with genuinely democratic government. But the fact is that many, if not most, of our elections now mean little more than the ratification of one or the other of two slates of candidates previously arranged by irresponsible and unofficial experts, operating more or less in secret.

The recent adoption of commission and manager government in several hundred cities has been accompanied by a noteworthy

¹ The national government presents no difficulty at this point; hence only state and local offices need be spoken of.

reduction in the number of elective municipal officers. In state and county governments, on the other hand, comparatively slight progress toward a shorter ballot has been made. This is partly due to the fact that constitutional amendments are necessary before many elective offices can be converted into appointive ones, and it is also to be explained by the unrelenting opposition of most professional politicians to changes which obviously would materially lessen their importance and power.¹

The last of the several criticisms of our system of elections mentioned above is directed against the plurality rule in deciding elections. It is a principle of democratic government that elective offices shall be filled in accordance with the wishes of a majority of the voters.² Our well-nigh universal system of plurality elections often violates this principle; for, whenever there are three or more candidates for a single office, the successful candidate—that is, the one receiving the highest vote—is very likely to be elected by only a minority of the voters. In national, state, and county elections practically nothing has been accomplished toward remedying this situation. In city elections, however, a solution has been found in the principle of preferential voting. Since 1909, more than fifty cities³ have done away with primary elections and have substituted nomination by petition, followed by the use of a preferential ballot on election day. On this ballot names of candidates are grouped by offices, as in the Massachusetts type of ballot, but at the right of each candidate's name are three columns in which the voter may express his first, second, and third choices, although he is not permitted to express more than one choice for the same candidate and is not required to indicate more than his first choice. If any candidate is found to have received a majority of the first-choice votes, he is at once declared elected. If no one has a majority, the result is usually determined by adding the second-choice votes to the first-choices. If even then no candidate has a majority, to the

CHAP.
XLII

4. Plurality elections

Preferential ballot

¹Some states have shortened the ballot in presidential elections by omitting the names of presidential electors. Names of presidential and vice-presidential candidates appear on the ballot, and the governor issues a certificate of election to the electors of the party which carries the state.

²See C. A. Beard, "The Fiction of Majority Rule," *Atlantic Monthly*, CXL, 831-836 (Dec., 1927).

³Notably San Francisco, Spokane, Portland, Denver, and Columbus. In Cleveland the preferential ballot was also used for some years previous to the substitution of proportional representation in 1922. In San Francisco also the preferential ballot is no longer used, owing in part to the small number of voters who indicated more than one choice on their ballots and in part to the recent adoption of voting machines.

CHAP.
XLII

first- and second-choice votes are added the third choices, and the candidate who now has the *highest* number is declared elected. In behalf of preferential voting, perhaps the most impressive claims advanced are that it comes nearer to election by absolute majority than any other system yet devised; that, by giving each voter a much wider range of choice among candidates, it tends to emphasize issues rather than personalities, and thus to eliminate personal attacks and recriminations; and that it obviates the necessity of bringing the voters to the polls on two different days, and hence makes possible the abolition of the cumbersome and expensive primary system.¹

Proportional representation

Closely resembling the system of preferential voting is the Hare system of proportional representation, which is now receiving wide consideration as a remedy for the defects of plurality election of members of legislative bodies and of elective boards and commissions. No state has yet adopted it for the legislature; but, beginning with Ashtabula, Ohio, in 1916, a number of cities have taken up proportional representation for the election of members of the city council, and the system seems to be slowly growing in favor.²

Accountability of public officials

In whatever way state and local officers are chosen, whether by appointment or by popular election, whether by means of a partisan or a non-partisan ballot, it is essential to truly democratic government that all such officials not only shall be legally responsible to the electorate but shall be made to have a lively and continuing sense of that responsibility. How, it has been asked over and over during the past few years, can public officials be made to realize that they must exercise the powers of their respective offices, not for the advantage of any special interest or political machine, nor for the benefit of any single class in the community, but in the interest of all the people? If a legislative, administrative, or judicial officer

¹ R. M. Hull, "Preferential Voting and How It Works," *Nat. Mun. Rev.*, I, 386-399 (July, 1912); L. J. Johnson, "Preferential Voting," *ibid.*, III, 83-92 (Jan., 1914); "The Preferential Ballot as a Substitute for the Direct Primary," 63rd Cong., 3rd Sess., Sen. Doc. No. 985 (1915); "Municipal Elections," *Transactions Common. Club of Cal.*, XI, 173-233 (Aug., 1916).

² Proportional representation (Hare system) was adopted in Boulder, Colorado, in 1917, in Kalamazoo, Michigan, in 1918, in Sacramento, California, in 1921, in Cleveland in 1922, and in Cincinnati in 1924. The system has been held to be unconstitutional in Michigan (1920) and California (1922). See W. Anderson, "The Constitutionality of Proportional Representation," *Nat. Mun. Rev.*, XII, Supplement, 745-762 (Dec., 1923); R. Moley and C. A. Bloomfield, "Ashtabula's Ten Years' Trial of Proportional Representation," *Nat. Mun. Rev.*, XV, 651-660 (Nov., 1926); C. G. Hoag and G. H. Hallett, Jr., *Proportional Representation* (New York, 1926).

proves unfaithful, incompetent, or otherwise unworthy of public confidence, what is the best means of getting rid of him? The perfectly obvious answer is, of course, refusal to reëlect him when his term of office expires. Another almost equally obvious answer in the case of appointive officials is to bring pressure to bear upon the appointing officer to remove the unworthy appointee. In our discussion of the state executive, however, it was explained that the governor's power of removal is often so hedged about as to be a very ineffective means of enforcing a sense of responsibility on the part of high appointive state officers; and much the same sort of situation exists with respect to the removal of many appointive county and local officers. Impeachment of the principal elective state officers, including judges, is authorized in almost every state constitution; while, in the case of judges, nearly half of the states provide a further method of removal by action of the legislature.¹ Provision is also made in several states for the indictment, trial by jury, and removal, upon conviction, of certain elective officers who have been guilty of grave derelictions of duty. On the whole, however, it has to be admitted that all of these methods of enforcing a sense of accountability to the electorate are so slow and cumbersome as to be practically unworkable and entirely inadequate save in the most flagrant cases of malfeasance.²

CHAP.
XLII

Ways of
enforcing
responsi-
bility

Nearly one-fourth of the states, losing patience with these older methods of enforcing responsibility, have adopted a much more summary mode of removal, namely, a special election in which an officer may be ousted by popular vote. The recall, as this process is termed, made its first appearance in this country in the municipal charter of Los Angeles in 1903. From there it has been extended, in one form or another, to cover state officers in eleven states.³ It has also been made a prominent feature of the commission form of city government in most states in which that system is authorized. As a rule, the device is made applicable only to elective offices, although in some cases it has been extended to appointive ones as

The recall

¹See pp. 823-824.

²C. Kettleborough, "Removal of Public Officers: A Ten Years' Review," *Amer. Polit. Sci. Rev.*, VIII, 621-629 (Nov., 1914).

³Oregon (1908), California (1911), Colorado, Washington, Idaho, Nevada, and Arizona (1912), Michigan (1913), Louisiana and Kansas (1914), North Dakota (1920), and Wisconsin (1926). Actually, however, Idaho is without the recall, inasmuch as the legislature has not passed the necessary legislation under the authority conferred by the constitutional amendment of 1912.

well, on the ground that such offices are often as important politically as many elective ones.

The procedure customarily employed in bringing about removal by a recall can be explained briefly. A petition containing a statement of the charges against the official whose removal is sought, signed by a special percentage of the qualified voters, is filed with some officer designated by law. If the petition is found to be in proper legal form, a date is set for the removal, or "recall," election, usually thirty or forty days after the petition has been filed. The officer whose recall is sought may avoid actual recall by resigning within a certain number of days after the filing of the petition; or he may be a candidate to succeed himself and, unless he requests otherwise, his name will be placed upon the ballot without formal nomination. Other candidates may be nominated, usually by petition, and the recall election is conducted in practically the same manner as any other election. The candidate who receives the highest number of votes wins. If he is the incumbent, he remains in office and is said to be vindicated; if a rival candidate polls the highest vote, he serves during the remainder of the term and the incumbent is said to be "recalled." It is usually provided that no petition for a recall election may be filed until an official has served for a stipulated period of time, commonly six months. As a rule, a second recall election cannot be ordered during the term for which an official was elected.

The chief claim put forward in support of this drastic method of getting rid of unsatisfactory office-holders is that, in view of the ease with which it can be set in operation, it is far more effective in bringing home to public officials a proper sense of their responsibility to the people than any of the older methods of removal enumerated above. Faced by the possibility of being recalled at almost any time before the end of his term, no official can feel free to cut loose from his constituents in the consciousness that he is practically certain to serve out his full term. The device also tends to substitute a healthy sense of accountability to the public for an all too common sense of dependence upon political bosses and machines. The chief value of the recall, in the opinion of some, lies in the possibility it holds out of lengthening the terms of many public officers. These can safely be made longer when the officer can be removed practically at any time by resort to the recall. Lengthened terms would, of course, mean longer experience in office, and thus would tend to bring about greater efficiency

in the performance of official duties, more continuity in administrative policies, and elimination of a great amount of waste and inefficiency now traceable to "labor turnover" in the public service.

CHAP.
XLII

On the other hand, the recall has such grave limitations that it can hardly be regarded as an ideal method of terminating an official career. Such a method should operate expeditiously, guarantee a fair trial for the official, provide for full presentation of the facts, ensure a fairly intelligent and impartial trial body, and render reasonably certain that the decision as to removal or retention in office is based upon relevant facts and not upon extraneous considerations. In applying these standards to the recall one must take into account the different kinds of duties attached to various public offices and also the different kinds of charges that are likely to be preferred in a recall petition. It will then be found that, as a corrective for official misconduct or incompetence, the recall is likely to function satisfactorily only when applied to officials who serve mainly in a representative capacity—*e.g.*, members of state legislatures, city councils and commissions, and certain administrative boards or commissions—and such executive officers as the governor, attorney-general, mayor, and corporation counsel, and also possibly the higher judiciary when passing upon the constitutionality of laws enacted under the police power.¹ In such cases the recall presents to the voters a comparatively simple issue, namely, Has this officer fairly and truly represented or reflected our opinion in the part that he has taken in determining public policy? It is only under such circumstances—and not always even then, it is to be feared—that the recall can be said to approach the ideal means of enforcing a due sense of official responsibility to the electorate.²

Limitations
of the
recall

Although the recall is usually made available for the removal of all classes of elective officials, it has been resorted to in surprisingly few instances, quite contrary to the early predictions of opponents. No exact figures are available, but it appears that the number of recall elections since 1903 has not exceeded one hundred and fifty, and that the number of officials who have been removed in this manner is not over sixty or seventy. The great majority of recall elections have been directed at city officials. Nearly twenty years elapsed after the recall first appeared before

The recall
in operation

¹ See pp. 693-694.

² A. B. Hall, *Popular Government*, Chap. IX.

it was used against any officer chosen by the voters of an entire state; and as yet there have been only two instances of this sort. In 1921 the governor, attorney-general, and commissioner of agriculture in North Dakota were recalled because of their connection with certain issues growing out of the Non-Partisan League movement.¹ The other case occurred in Oregon in May, 1922, when two members of the state public utility commission were recalled, because of popular dissatisfaction with certain rate increases which the commission had authorized.²

REFERENCES

- P. O. Ray, *Introduction to Political Parties and Practical Politics* (3rd ed., New York, 1924), Chaps. IV-VI, IX-XIII, XVI-XVII.
 R. C. Brooks, *Political Parties and Electoral Problems* (New York, 1923), Chaps. VIII-X, XV-XVI, XVIII.
 E. M. Sait, *American Parties and Elections* (New York, 1927), Chaps. XII-XVI, XIX-XXII.
 H. R. Bruce, *American Parties and Politics* (New York, 1927), Chaps. XI-XII, XV-XIX.
 W. F. Dodd, *State Government* (New York, 1922), Chaps. XVII-XVIII, and pp. 540-544.
 C. E. Merriam, *The American Party System* (New York, 1922), Chaps. IX-X.
 J. A. Woodburn, *Political Parties and Party Problems* (rev. ed., New York 1914), Chaps. XV-XVI, XX-XXI.
 C. G. and B. M. Haines, *Principles and Problems of Government* (New York, 1921), Pt. II, Chaps. I-II.
 A. B. Hall, *Popular Government* (New York, 1921), Chaps. IV, IX-X.
 A. N. Holcombe, *State Government in the United States* (New York, 1916, 1926), Chaps. VI-VIII.
 ———, *The Political Parties of To-Day* (New York, 1924).
 E. Kimball, *National Government of the United States* (New York, 1922), Chaps. III-V.
 C. A. Beard, *American Government and Politics* (4th ed., New York, 1924), pp. 515-524 and Chap. XXV.

¹ *Nat. Mun. Rev.*, XI, 3-5 (Jan., 1922); *Literary Digest*, LXXI, Oct. 22, 1921, pp. 12-13; *ibid.*, LXXI, Nov. 19, 1921, p. 10.

² One commissioner had been elected by the entire state, the other from a district. *Nat. Mun. Rev.*, XI, 212-213 (July, 1922). See also J. D. Barnett, *Operation of the Initiative, Referendum, and Recall in Oregon* (New York, 1915), Pt. II; D. F. Wilcox, *Government by All the People* (New York, 1912), Chaps. XXIV-XXVI; H. S. Gilbertson, "Conservative Aspects of the Recall," *Nat. Mun. Rev.*, I, 204-211 (Apr., 1912); F. S. Fitzpatrick, "Some Recent Uses of the Recall," *ibid.*, V, 380-387 (July, 1916); C. A. Beard and B. E. Shultz, *Documents on the State-Wide Initiative, Referendum, and Recall* (New York, 1912), 52-69, 242-279; *Equity*, XVIII (Oct., 1916), containing reports on the use, or attempted use, of the recall in a large number of states; J. O. Garber, "The Use of the Recall in American Cities," *Nat. Mun. Rev.*, XV, 259-261 (May, 1926).

- J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chap. XLVI; II, Chaps. LVII-LXVIII, LXXXVIII-LXXXIX, XCLX.
- A. Ludington, "Proposed Methods of Ballot Simplification," *Amer. Polit. Sci. Assoc. Proceedings*, VI, 72-92 (1909).
- Ill. *Const. Conv. Bull.* No. 5, "The Short Ballot (Springfield, 1920).
- C. L. Jones, *Readings on Parties and Elections* (New York, 1912).
- M. Ostrogorski, *Democracy and the Party System* (New York, 1910).
- F. R. Kent, *The Great Game of Politics* (Garden City, 1923).
- A. C. Millspaugh, "Party Organization and Machinery in Michigan," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XXXV (1917).
- R. S. Boots, *The Direct Primary in New Jersey* (New York, 1917).
- E. C. Meyer, *Nominating Systems* (Madison, 1902).
- A. M. Kales, *Unpopular Government in the United States* (Chicago, 1914).
- J. K. Pollock, Jr., *Party Campaign Funds* (New York, 1926).

PART V. LOCAL GOVERNMENT AND ADMINISTRATION

CHAPTER XLIII

THE COUNTY AND ITS GOVERNMENT

Relation
between
the states
and the
local gov-
ernment
areas

As has been apparent throughout the preceding group of chapters, it is but a step from the government of the state to the government of the county, city, town, township, village, or other local political division. Every such area has been authorized and established by state authority; its powers and functions, and to a large extent its organization, are such as the state confers or prescribes; and the state utilizes practically all local government machinery in the enforcement of its laws, the collection of its revenues, and the performance of many of its administrative functions. The relation between the state and its subdivisions is totally different from that existing, on the other side, between the state and the United States. In the latter case, the smaller area is not, except in some more or less incidental ways, an administrative division existing for the use and convenience of the larger; on the contrary, it is, within limits, a separate, sovereign area of government, on a footing with the nation itself. The county, city, and township, on the other hand, while organized partly to meet the demand for local control of local affairs, exist by no original or inherent right, have no reserved or residual powers, and can be altered, or even abolished, by the state at will. In other words, the United States is organized on a federal basis, while the governmental system of each state is strictly unitary.

Having studied the state governments in those aspects that are, speaking broadly, general and state-wide, we come now to some consideration of the various forms of local government that have established themselves among us—a subject of the greater importance because local government not only costs the average citizen more than the government of either nation or states as such ¹ but, in general, touches his daily life more closely.

¹ In 1922 the amount raised by taxes, licenses, permits, and special assessments for state purposes was \$867,552,000, or \$8.01 per capita, while the aggregate for county and other local government purposes was \$3,353,360,000, or more than \$32.24 per capita. Bureau of the Census, *Wealth, Public Debt., and Taxation: 1922*, "Taxes Collected," 12.

In an earlier chapter we have seen that two distinct types of local government arose in the seaboard colonies before the Revolution, one of them in New England and the other south of the Potomac; and that in the middle colonies a mixed type developed, embracing both features found in the New England town and others characteristic of the southern county.¹ These two or three systems served their purpose so well that when independence was achieved few and slight changes were made in them. Indeed, in most respects they are about the same today as a century and a half ago. Such alterations as have been made pertain not so much to structural arrangements as to the methods of choosing the local officers and to the supervision of these officers by the state authorities.²

CHAP.
XLIIIEarly types
of local or-
ganization

As the nation expanded westward after the Revolution, the settlers from the older eastern states, moving, as a rule, along parallels of latitude, transplanted in the new states the system of local government with which the majority in each case had been most familiar in the old home-state. Hence the county is the principal unit of local government in southern and south central states, while the combined county-township system predominates in the north central states. In Michigan, Illinois, Wisconsin, and Minnesota, whose early settlers came mainly from New York and New England, the township is relatively a more important area than in states whose first white inhabitants came largely from the South, *e.g.*, Ohio, Indiana, Kansas, and Nebraska, where the county preponderates. Sometimes two lines of migration, one from the old South and the other from the old North, meeting in a single state, have effected a compromise whereby the inhabitants of each county are permitted to decide for themselves whether they will subdivide the county into townships or retain the county unit intact. This has happened both in Illinois and Nebraska. In the former, 85 out of the 102 counties have adopted the township system; in the latter, 44 out of a total of 93.

Spread of
county and
township
government

In addition to this transplanting and readaptation of older local government institutions in the western country, three main developments since the Revolution are to be noted. The first may be described as the democratizing of local government, including both the conversion of appointive offices into elective offices and

Other
changes
since the
Revolution¹ Chap. VII.² On the historical development of local government, see H. G. James, *Local Government in the United States*, Chap. II; K. H. Porter, *County and Township Government in the United States*, Chaps. III-IV.

the broadening of the suffrage. These changes naturally accompanied similar steps in connection with state offices, already described. The second development is the growth of cities, giving rise to many of our most urgent and difficult problems of local government today. This phenomenon appeared in the first half of the nineteenth century and to date shows no sign of being permanently checked. Of late there has been a marked tendency in some sections of the country to subdivide cities, townships, or counties, or to combine the whole or portions of two or more of these local government areas into new municipal corporations, under varying names, for the more effectual carrying on of some community enterprise. A third development is no less important. Although the principal local officials continue to be chosen almost uniformly throughout the country by popular election, with no intervention from the state authorities, their official activities are being more and more strictly defined by state laws imposing specific duties upon them, and are being increasingly circumscribed by state supervision over them in the performance of their duties. These tendencies are especially to be noted in the administration of public education, the enforcement of regulations pertaining to public health, and the collection and expenditure of local taxes and other revenues. Numerous illustrations will appear as we proceed.

The
county:
general
features

The largest, although not always the most important, local government area is, in every state except Louisiana, the county; there the principal political subdivision, corresponding to the county elsewhere, is the parish. Most states have from sixty to one hundred counties. In Delaware and Rhode Island, however, there are only three and five, respectively, while in Texas there are 253. Massachusetts, with fourteen, has the smallest number in proportion to population.¹ New York county and San Bernardino county, California, have the distinction of being, respectively, the smallest and the largest of counties, the former having an area of only twenty-two square miles, while the latter comprises 20,175 square miles, an area almost equal to that of Massachusetts, Connecticut, and New Hampshire combined. The most common areas are between four hundred and six hundred square miles. In population, also, there is great variation, running all the way from Cochran county in Texas, which at the census of 1920 had only sixty-five inhabitants, up to New York county with nearly two and a half

¹In 1920 there were 3,037 counties in all.

million, and Cook county, Illinois, with more than three million. The majority have populations somewhere between ten and thirty thousand. The greater number are rural in character; hardly more than one-sixth have any urban communities of over 8,000 inhabitants.

CHAP.
XLIII

The county has been well termed the "dark continent of American politics"; for the average citizen takes little interest in, and knows almost nothing about, his county government and its activities. Nevertheless, the county is, from a number of points of view, a very important governmental unit. (1) It is a much used unit for the administration of state laws, especially such as relate to taxation and the prevention and punishment of crime. (2) It is a leading area of judicial administration, being the sphere of justices of the peace, the county court, the surrogate or probate court, and of the officials connected therewith, notably the sheriff and the prosecuting attorney. In the county court almost all important law-suits and prosecutions for serious criminal offenses are begun, and to this court minor civil and criminal actions may be carried on appeal from the city and rural justice-courts. Every county maintains a court-house and at least one penal or correctional institution. (3) The county is an important recording agency for a large variety of documents, including deeds and mortgages, surveys of land plats, wills, and court proceedings. (4) Outside of New England, the county is an important district for school purposes, with an elective superintendent of schools who exercises more or less supervision over public schools, especially those located outside of cities or incorporated towns and villages, which frequently are removed from the jurisdiction of the county superintendent.¹ Since 1910 the establishment of free county circulating libraries for the benefit of people in the rural sections and in small towns or villages has been authorized in about a dozen states, including California, where nearly fifty county libraries are to be found.² (5) The county, in most sections of the country, is the principal agency for laying out and repairing highways and con-

County
functions

¹ F. H. Harrin, "County Administration of School Affairs in its Relation to the State Department," *Annals Amer. Acad. Polit. and Soc. Sci.*, XLVII, 153-165 (May, 1913).

² W. A. Dwyer, "Putting Character into Counties," *World's Work*, XXX, 604-613 (Sept., 1915). In California, all but twelve of the fifty-eight counties now (1928) have county libraries, and for their maintenance are spending about \$1,750,000 annually. These libraries have four and a quarter million volumes, and serve the people through about 4,200 branches and by supplying over 2,400 school districts.

structing and maintaining bridges. (6) The charitable or welfare work done by counties constitutes one of their most important functions in many parts of the country. The county poor-farm or almhouse is a familiar institution outside of New England, and not altogether unknown there. In populous counties, one not infrequently finds county hospitals; and a variety of other welfare activities are carried on under the auspices of the county government. In Cook county, Illinois, for example, about one-half of the total county budget, which in recent years has aggregated approximately twenty million dollars, has gone for charitable or welfare activities of one kind or another.¹ In rural counties county hospitals also have been established or authorized in about a dozen states, beginning with Iowa in 1909.² (7) In a number of respects the county is an important political unit: the selection of polling-places, the appointment of election officials, and canvassing the votes cast at primaries and general elections are commonly made county functions. Counties are also units of representation in one or both branches of the state legislature; they are important units in the state party organizations; and, lastly, they have often been convenient subdivisions for determining questions of public policy, such as authorizing or prohibiting the sale of liquor under local option laws.³

The county, like the city, is a governmental subdivision of the state, endowed with certain rights and powers. As a quasi-municipal corporation, it can acquire, hold, and dispose of both real and personal property, make contracts, and sue and be sued in the courts. Its corporate powers are, however, less extensive and varied than those of an ordinary city, being indeed quite incidental and secondary in importance to its governmental functions. Furthermore, its powers are seldom granted in a single document like the city charter or a general municipal code, but are usually to be found scattered through a score or more of statutes passed at different times by the state legislature. Like the city, the county is legally the creature of the legislature, which, in the North

¹ Cook County, *Charity Service Reports* (1922).

² K. H. Porter, *County and Township Government in the United States*, Chap. xii; F. G. Nifong, "A County Hospital in a Missouri Town," *Amer. City*, 610-614 (Dec., 1923); J. A. Kingsbury, "Cattaraugus County and Our Rural Health," *Nat. Mun. Rev.*, XVI, 363-369 (June, 1927); E. F. Harris, "Charity Functions of a Pennsylvania County," *Annals Amer. Acad. Polit. and Soc. Sci.*, XLVII, 166-181 (May, 1913).

³ C. L. Jones, "The County in Politics," *ibid.*, XLVII, 85-100 (May, 1913).

Atlantic states and some others, is quite free to create, combine, or abolish counties and to extend or limit their powers regardless of the wishes of the inhabitants and unhampered by any constitutional limitations. In most states, however, constitutional provisions protect counties against legislative annihilation or impairment.

CHAP.
XLIII

Not only do constitutional stipulations limit the power of the legislature in dealing with counties; frequently they also limit the power of counties themselves. Among the most common of the latter sort of restrictions are provisions setting a limit to the rate of taxation which may be authorized by county officials and prohibiting counties from incurring indebtedness beyond a specified amount. Not infrequently, however, these debt limits may be exceeded for some particular object after special authorization by the legislature or after a popular referendum. The powers of both the legislature and the county are further curtailed in about two-thirds of the states by constitutional provisions specifically naming the officers which each county must have and fixing the amount and method of their compensation. None of the offices thus provided for can be abolished, nor may the method of filling them be changed either by the county or by the legislature. At the same time, the legislature is generally free to create as many additional offices as it sees fit. Herein, it will be perceived, lies one of the most serious obstacles to the adoption of a shorter ballot.

Restrictions on
counties

To the governmental organization of counties very little thought appears to have been given by constitutional conventions, state legislatures, or the general public, at all events in comparison with the amount of attention bestowed on the governments of states and cities. There is everywhere a large number of elective county officials, but no distinction has been made between policy-determining offices, which may appropriately be filled by popular election, and purely ministerial offices, the filling of which by popular election serves no useful public purpose. Curiously, furthermore, county government all over the country has been organized in entire disregard of the traditional three-fold division of governmental powers, with its concomitant system of checks and balances. The county courts which one finds everywhere, together with their officials, are merely parts of the state judicial machinery, not a coördinate branch of county government; and county legislative functions, which indeed are extremely few, are assigned to a body whose work, like that of the commission in commission-governed

Organiza-
tion of
county
government

cities, is almost wholly administrative. This agency, commonly known as the county board, comes nearest to being the central governing body; and it, chiefly, calls for somewhat detailed consideration.

A county board is found in all states except Georgia and Rhode Island, and is everywhere an elective body, except in Connecticut, where the members are appointed by the state legislature, and in the majority of South Carolina counties, where they are appointed by the governor on recommendation of the local members of the legislature. The usual term is two years. The board bears different names in different parts of the country, and its composition varies greatly in different states. Where there are townships, and in a few other states as well, it is called the board of supervisors; in states or counties without township government it is commonly known as the board of county commissioners. Sometimes boards of supervisors and boards of commissioners are found in the same state, as in Illinois, where eighty-four counties have the former and seventeen counties the latter, while a special board has been created for Cook county.

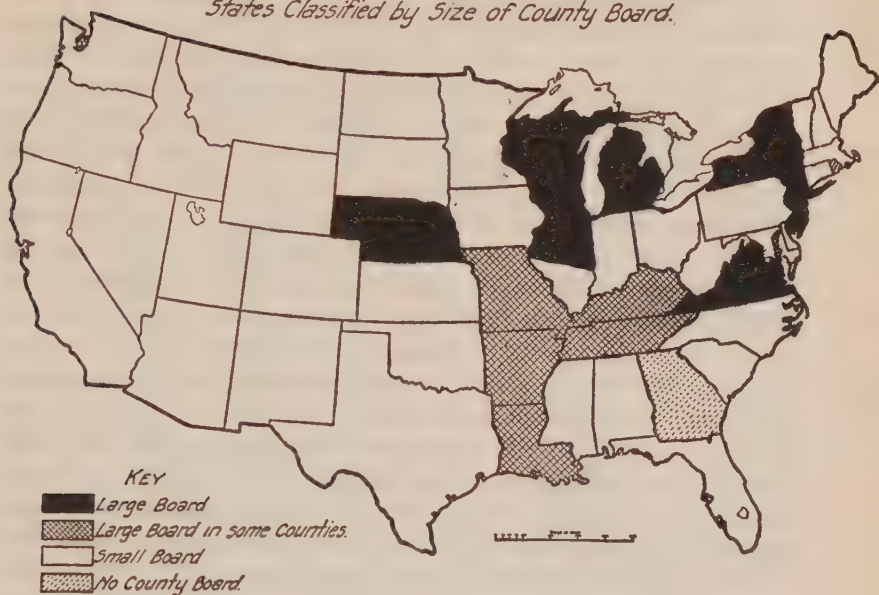
The board
of county
commis-
sioners or
supervisors

A board of supervisors is composed, in most states, of representatives elected from the various towns and cities in the county, one generally being chosen from each town or city ward. Seldom is there any attempt to apportion representation on a population basis, although something has been done in this direction in Illinois, where one supervisor is allotted to every township, regardless of its size, and an assistant supervisor to each town for each 2,500 population over four thousand. This results in many large boards, eighteen Illinois counties having boards with thirty or more members, while in one county (La Salle) the board numbers fifty-three. Such large boards are, however, found only in New Jersey, New York, Michigan, Nebraska, Virginia, and Wisconsin,¹ and parts of Arkansas, Kentucky, Missouri, and Tennessee. In the majority of states, on the other hand, there are small boards of county commissioners consisting of three, five, or seven members, elected from the county at large in Ohio, Pennsylvania, Maryland, and South Dakota, and chosen in districts into which the county is subdivided in Indiana, Iowa, Minnesota, Kansas, Nebraska, and North Dakota.²

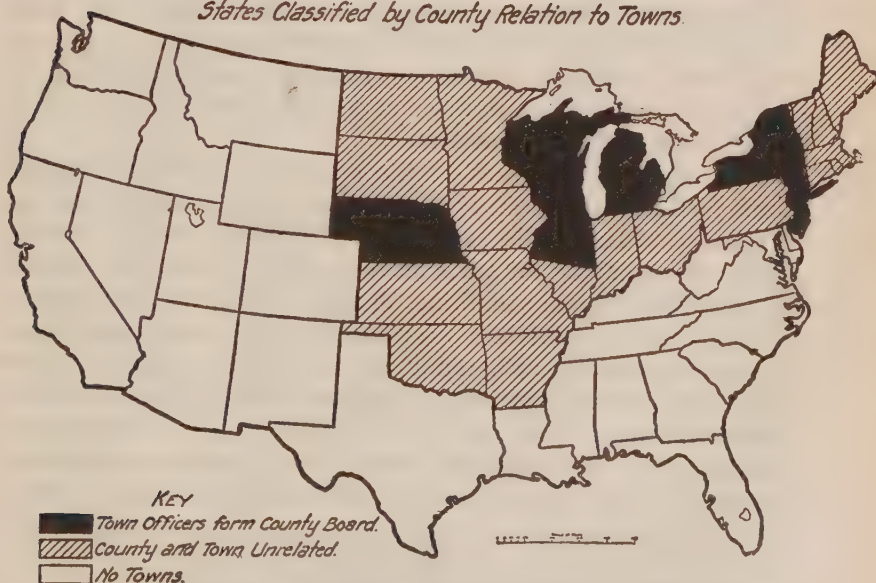
¹ The legislature of Wisconsin passed a law in 1921 permitting counties to adopt, in place of the large board of supervisors, a governing body of five commissioners, elected in rotation from districts of substantially equal population.

² Called supervisors in Iowa and Nebraska.

COUNTY GOVERNMENT IN THE UNITED STATES
States Classified by Size of County Board.



States Classified by County Relation to Towns.



(Report of the New York Special Joint Committee on Taxation and Retrenchment, 1923.)

CHAP.
XLIIIAbsence of
a chief
executive

Almost nowhere is there any chief executive officer in the county board; each board elects its own chairman, but he has no veto upon the acts of the board and little, if any, more power in other respects than any other member. Exceptions are to be found in the president of the Cook county board in Illinois, who is elected directly to that office by the voters and has a veto upon the acts of the board, including appropriations, and who also has important appointing powers; and in the county supervisor in Essex and Hudson counties, New Jersey, who is similarly chosen and has much the same authority.¹ But the possibilities of leadership and control connected with these positions have never been developed by any incumbent in either Illinois or New Jersey.

Powers of
the county
board:

Like city councils, county boards, in general, can exercise only such powers as are expressly conferred on them by statute or are clearly necessary to the performance of their public functions. Even in the same state, county boards will sometimes be found with greatly varying powers, owing to the large amount of special county legislation which has been enacted from time to time. The county board is, however, for most purposes the general public agent by which the powers of the county are exercised; and a detailed study of the work of these bodies throughout the country will show that commonly, though not in every state, their duties and powers relate to (1) financial matters, (2) county property and public works, (3) elections, (4) charities and corrections, (5) the appointment and supervision of county officers, and (6) a large variety of miscellaneous matters.

1. Finance

The financial activities of the county board include levying taxes for county purposes; ²levying the county's share of the general property tax for the support of the state government; authorizing and arranging for loans on the credit of the county, usually through bond issues; equalizing, in many states, the assessment of taxes among the different townships and cities in the county; serving, in some states, as a board of review to hear and decide appeals of taxpayers from property valuations made by local assessors; passing upon the allowance of all bills and accounts against the county, where there is no separate county auditor or comptroller; fixing the salary or other compensation of minor county officials

¹ W. Paul and H. S. Gilbertson, "Counties of the First Class in New Jersey," *Amer. Polit. Sci. Rev.*, Supplement, VIII, 292-301 (Feb., 1914).

² H. A. Barth, "The Trend in County Revenues," *Annals Amer. Acad. Polit. and Soc. Sci.*, CXIII, 22-30 (May, 1924); I. L. Pollock, "The Trend of County Expenditures," *Nat. Mun. Rev.*, XVI, 383-389 (June, 1927).

[illegible]

25 TOWNS - 3 CITIES
TOTAL DISTRICTS - 54

ERIE COUNTY

BOARD OF SUPERVISORS
(54)
2 Years
Chairman

County Clerk	\$ 412	\$ 5000
District Attorney	\$ 412	\$ 10,000

County Auditor
4 Years
\$5000

County Treasurer
3 Years
\$6000

Justices
Supreme Court
Resident in
Pine County

Deputy
County
Clerk
\$1000

Deputy County Auditor \$3600

Comm'r of Surrs
3 years
\$4500

10

Deputy
Comm'r
of Lunars
Seco

Additional Officer

LEG
Const

for Co. 1977	Purchasing Agent 4 Yrs. \$4,000	Comm'l. Industrial Aid Bureau \$7,500	Co. Eng. \$5,000
--------------------	--	--	------------------------

ny office.
cio member.

Ex off

Deputy
Purchasing
Agent

As
Dm
Ca

GOVERNMENTAL ORGANIZATION

6

LEGEND
☐ Constitutional Officer.
☐ Statutory Office.
 --- Ex officio member.

GOVERNMENTAL ORGANIZATION IN A POPULOUS NEW YORK COUNTY.

(Report of New York Special Joint Committee on Taxation and Retrenchment, 1923.)

CHAP.
XLIII2. Custody
of county
property

and employees; and, in practically all states, making appropriations of county funds for various county purposes.

The county board is the official custodian or trustee of all county property, real and personal, including the court-house, jail, work-house, poor-farm or almshouse, hospitals, and libraries, and is required to lease or erect buildings suitable for the use of all county officers. In some sections of the country the board also undertakes various public works, such as locating, constructing, and repairing the most important roads, building the principal bridges, erecting levees or dikes, and constructing drains, ditches, and irrigation works. Usually, however, such public works and the erection of county buildings are left to private parties, in which case the necessary contracts are awarded by the county board. Similarly, to the county board falls the duty of letting contracts for printing, and for purchasing equipment for county buildings, office supplies, and materials used in county institutions. The opportunity thus afforded to strengthen themselves politically in dispensing this patronage is not lost upon the practical-minded members of the board; indeed, this is the phase of county business in which they often seem most keenly interested.¹

3. Control
of elec-
tions

In most states outside of New England the county board marks out voting precincts, designates polling places, appoints election officials, prepares, prints, and distributes the ballots used on primary and election days, and, after the election is over, serves as a board to canvass the results of primaries and general elections, which are certified by it to the proper county and state officers.

4. Super-
vision of
charities
and cor-
rections

For the charitable and other welfare work of the county the county board is ultimately responsible. The administration of the county jail, the poor-farm or the almshouse, the county hospital, and other similar institutions, and the carrying on of varied forms of welfare activity, come within its general jurisdiction, although the actual management of these institutions may be delegated to other elective or appointive officials. Frequently the patronage attached to the poor relief and charitable work of the county is considerable, subjecting the officials in charge of it to much local pressure, both political and social.

5. Appoint-
ments

Outside of the most populous counties, the appointing power of the county board is not extensive, and its power of removal is even less so. In one state or another the county board appoints the over-

¹K. H. Porter, *County and Township Government in the United States*, 120-124.

seer of the poor, the superintendent of the workhouse, a county attorney, drainage or highway commissioners, election boards, a county physician, a county health officer or health board, a "commissioner of Canada thistles," fence viewers, mine inspectors, a county treasurer and an auditor, a superintendent of highways, a county farm adviser, a county engineer, and a purchasing agent. Vacancies occurring in elective county offices may also sometimes be filled by action of the board. In populous counties, where many activities are carried on by the county government, the board is likely to have the power to fill a very large number of positions on the county payroll,¹ and the appointments frequently show the spoils system at its worst. In six populous counties, however, a serious attempt has been made to eliminate, or at least to reduce, this evil by the introduction of competitive civil service examinations.²

The miscellaneous matters falling to county boards include the issuing of licenses for certain trades or occupations, such as liquor-selling, keeping hotels or inns, auctioneering, peddling, and operating ferries; offering bounties for the destruction of wild animals or noxious weeds; regulating fishing; safeguarding grade-crossings; incorporating literary and benevolent societies; preparing lists of persons eligible to serve as jurymen in the courts; serving as a board of health, and as a forest preserve board; and organizing townships, school and road districts, and other county subdivisions created for various purposes.

Miscella-
neous

Besides the county board, every state except Rhode Island has six or more elective county officers. In Illinois there are from nine to fifteen such officers in most counties, while in Cook county there are over eighty, counting the judges of the circuit and superior courts. All of these elective officers are largely independent one of another and of the county board, and usually of the higher state officials as well. In Rhode Island there are only two county officers, the sheriff and the county clerk, both of whom are appointed by the legislature. Of the numerous county officials, with widely varying titles and duties throughout the country, the most important are the sheriff and the prosecuting attorney.

Other
county
officers:

The sheriff is found in every state in the Union, and is everywhere an elective official except in Rhode Island. His term is generally two years, although three-year and four-year terms are not

1. Sheriff

¹ In Cook county, Illinois, there are over three thousand such positions.

² Alameda, Los Angeles, and San Francisco counties, California; Milwaukee county, Wisconsin; Cook county, Illinois; and Wayne county, Michigan.

uncommon; and in a number of states the constitution makes him ineligible for immediate reelection. He has the right to appoint an almost unlimited number of deputies, whose powers become the same as his own; and he is made responsible for all their official acts. In some states the sheriff receives a salary. But usually both he and his deputies are paid by fees which, in the largest counties, sometimes mount to tens of thousands of dollars a year. This fact, and the further circumstance that in such counties a large number of subordinate positions, clerical and otherwise, are connected with the office and generally filled by the sheriff without civil service restrictions, makes the office one of the chief prizes for which local politicians strive.

The duties most commonly assigned to the sheriff fall into two main groups: those relating to the preservation of the public peace, sometimes called police duties, and those connected with the operation of the courts. On paper, the sheriff's police duties are very extensive. They include the control of the county jail, the arrest and safe-keeping of persons charged with crimes or misdemeanors, and the enforcement of statutes against gambling, vice, and liquor-selling. Except in some of the more sparsely settled portions of the country, these powers, in actual practice, are of limited scope. No county police, corresponding to city police forces, is at the sheriff's command, and the town constables and village and city police forces are in no way subject to his control. In time of public disorder, therefore, the sheriff's power to appoint additional deputies and to summon the *posse comitatus*, or general body of citizens, to aid him in protecting life and property generally amounts to nothing, and he is obliged to call upon the governor of the state for the assistance of the state militia or—where such a body exists—the state police.¹

The greater portion of the sheriff's time is consumed in the performance of duties as the executive agent of the courts. At each session of the county and higher courts he is present, either in person or by deputy; he opens and closes court sessions with a formal proclamation, and maintains a proper degree of decorum; he serves the various writs and other processes in connection with civil suits, and also warrants for the arrest of persons accused of crimes and subpœnas for the attendance of witnesses; he carries out the judgment of the court in civil cases, and executes the sentence of the court upon persons convicted of crimes or misde-

¹ K. H. Porter, *op. cit.*, 162-182.

meanors. In addition, he is *ex-officio* tax collector in some southern states and in some counties in Illinois, California, and Texas; he sometimes issues proclamations announcing the approach of primaries or elections; and in a few southern states he serves as public administrator of the estates of deceased persons who leave no heirs or relatives.

CHAP.
XLIII

Although sheriffs are elected locally, they are, in law, agents of the state, and many, if not most, of their functions have to do with the enforcement of state laws. Nevertheless, in but very few states do the higher state officials exercise an effective control over them. In Michigan, New York, and Wisconsin the governor may remove a sheriff for cause; and in Illinois he must remove a sheriff who allows a prisoner to be taken from his custody by a mob.¹

Of equal or greater importance is the public prosecutor, who is known by different titles in different states, such as state's attorney, district attorney, and county solicitor. Generally such an official is elected in each county. But in some states the attorneys are chosen in districts comprising more than one county; in which case their jurisdiction is not restricted to a single county but extends throughout their district. In a very few states the attorney is appointed by the governor,² or by the judges of some court, as in Connecticut. Selected in most instances county by county and by popular election, public prosecutors inevitably vary greatly in character and abilities; and they are likely to reflect the dominant sentiment of their communities toward law enforcement, a fact that partly explains the unfortunate lack of uniformity in the enforcement of laws against gambling, vice, liquor-selling, and other offenses in different parts of the same state. In order, therefore, to tone up county law-enforcement, the Louisiana constitution requires the attorney-general to supervise the work of all the district attorneys; other states merely permit the attorney-general to aid locally elected prosecutors in handling cases of unusual importance; in still other parts of the country, the attorney-general (sometimes a state court) is authorized to appoint special prosecutors either to assist, or entirely to supersede, the local attorney. However chosen and supervised, the prosecuting attorney is paid a salary in a number of states, and is recompensed with fees in others; but the tendency is to substitute salaries for the fee system.

2. Public
prosecutor

¹ C. J. Turek, "The Governor's Power to Remove County Officials," *Kentucky Law Jour.*, XIV, 330-337 (May, 1926).

² Alabama, Florida, Georgia, and New Mexico.

The most conspicuous duties of the prosecuting attorney, as the title implies, relate to the enforcement of criminal statutes; and the extent to which crime is repressed depends largely on the ability, energy, good judgment, and character of this official. He investigates crimes which come to his attention through the public press, the police, or on complaint of private citizens; he institutes proceedings for the arrest and detention of persons accused or suspected of crimes, and of important witnesses whose departure from the state is anticipated; he commences criminal actions where the facts in his judgment warrant it, either by filing an information with the proper court or by drawing up indictments and submitting evidence in support of them to a grand jury; and he conducts, either in person or by deputy, the trial of criminal cases.¹ To his recommendations concerning the fixing of bail, the discontinuance or nolle-prossing of criminal actions, and the severity of sentences to be imposed, courts generally give serious consideration. His criminal jurisdiction often extends also to public officials as well as to private persons, so that it becomes his duty to bring to trial officers whom he deems guilty of official misconduct or against whom some competent court directs him to proceed. Unfortunately, however, the close political affiliations of prosecuting attorneys with corrupt municipal or other local officials has often led them to ignore or neglect this function.

The office is indeed one of enormous responsibility, and possessed of almost unlimited possibilities for good or evil.² Its control, in counties having large cities, is a political prize of tremendous importance to both the law-abiding classes and the criminal and vicious elements interested in lax law-enforcement and a "wide-open town." Election contests for it have at times quite overshadowed in the popular mind the other phases of a municipal or state campaign. "Beyond question such an office should be entrusted to none but a lawyer of eminent attainments who is

¹ In order that poor persons charged with crimes or misdemeanors may have better legal advice and honest representation at their trial, the office of public defender has been created in some parts of the country, notably in Los Angeles county, California, in 1914. See W. J. Wood, "Necessity for Public Defender established by Statistics," *Jour. Crim. Law and Criminol.*, VII, 230-235 (July, 1916); *ibid.*, "The Public Defender," *Rev. of Revs.*, LXI, 303-307 (Mar., 1920); M. C. Goldman, *The Public Defender* (New York, 1917); A. M. Barrow, "Public Defender: A Bibliography," *Jour. Crim. Law and Criminol.*, XIV, 556-572 (Feb., 1924); R. H. Smith, *Justice and the Poor* (New York, 1919), Chap. xv; S. Rubin, "The Public Defender an Aid to Criminal Justice," *Jour. Crim. Law and Criminol.*, XVIII, 346-364 (Nov., 1927).

² C. Mellen, "How a Tammany District Attorney Used His Office for His Own Ends," *Nat. Mun. Rev.*, VIII, 291-298 (June, 1919).

a citizen of the highest character, interested in the public good, of unquestioned integrity, of exceptional poise, of great personal force, and fearless in the discharge of duty." Not a few men who have attained national prominence in public life first won distinction, and later political advancement, through their courageous and efficient administration of the office of prosecuting attorney, e.g., in New York City,¹ St. Louis, San Francisco, and Cook county, Illinois.

In most states the prosecuting attorney also has important civil duties: he is the legal adviser to most, if not all, of the county officials; he draws up and passes upon the validity of county contracts; he institutes and conducts suits brought by the county and defends those brought against the county, or against any officer thereof in his official capacity; he prosecutes all cases of forfeited official or jail bonds; and frequently he coöperates with the attorney-general of the state in the handling of important cases affecting the county.

The office of coroner is of nearly the same antiquity as that of sheriff, but is now far less important. Almost everywhere the coroner is an elective official, although in six or seven states he is appointed by the county board or by the judges of one of the higher courts. In Rhode Island he is appointed by the town council, and therefore is not a county official at all. The main duty of the coroner, as set forth in a New York statute,² is to investigate the circumstances under which any person has died "from criminal violence or by casualty, or suddenly when in apparent health, or when unattended by a physician, or in prison, or in any suspicious or unusual manner." Elsewhere the scope of the coroner's functions is often somewhat more restricted. In actual practice in most states the office really forms a part of the machinery of criminal justice, and only in cases where a crime is involved, or thought to be involved, do the findings of the coroner or his jury have any

3. Coroner

¹The organization and work of the district attorney's office in New York City is interestingly described by a former incumbent, C. A. Whitman, in his article, "The World's Greatest Prosecuting Office," *Rev. of Revs.*, XLIX, 705-713 (June, 1914). Cf. H. S. Gans, "The Public Prosecutor; his Powers, Temptations, and Limitations," *Annals of Amer. Acad. Polit. and Soc. Sci.*, XLVII, 120-133 (May, 1913); K. H. Porter, *op. cit.*, Chap. x; "What is Wrong with the Prosecutor?" *Jour. Amer. Judic. Soc.*, XI, 67-68 (Oct., 1927); W. M. Pickett, "The Office of Prosecutor in Connecticut," *Jour. Crim. Law and Criminol.*, XVII, 348-358 (Nov., 1926).

²For illustrations of the trivial duties imposed upon coroners in New York, see *Proceedings of the Conference for the Study and Reform of County Government*, Second Meeting, Jan. 22, 1914, pp. 11-16.

special significance. "To perform his duties properly, a coroner should be both a criminal lawyer and a specialized medical expert; but those elected can usually lay claim to neither qualification." In many cities the office is nothing but a booby prize awarded to some insignificant adherent of the dominant political machine. There should, of course, be the closest harmony and coöperation between the coroner and the prosecuting attorney; but not infrequently the two pull in opposite directions.

4. Clerk

County clerks are found in about one-half of the states. They are usually elected for two-year or four-year terms; but in Rhode Island they are chosen annually by the legislature, and in Vermont they are appointed for an indefinite term by the assistant judges of the county court. In some states the county clerk has a great variety of tasks to perform. In Illinois he is becoming, indeed, the chief executive officer of the county; and in New York he has duties in connection with the administration of at least a score of important state laws.¹ But, as a rule, his functions are neither numerous nor important.

5. Court
clerks

In almost all states, even where the county clerk serves as clerk of the county court, there are one or more separately elected or appointed court clerks. Both county clerks and court clerks may appoint deputies for whose official acts they are responsible. Court clerks keep the minutes of court proceedings and orders, and have custody of the records and the court seal. "They docket all cases for trial, filing all papers in each case together. They issue proper processes or writs at the beginning, during, and at the end of each suit; and enter judgments rendered by the court. They certify to the correctness of transcripts from the records of the court; and preserve property and money in the custody of the court. Their duties are for the most part ministerial; but some functions imposed by statute, such as the taxation of costs, the approval of bonds, and the assessment of damages in cases of default, are quasi-judicial."²

6. Other
county
officers

Other appointive or elective county officers, found in one state or another, can be barely mentioned. To describe them would be wearisome; besides, their nature and functions are sufficiently indicated by their names. Among them are the treasurer, auditor or comptroller; register of wills; register of probate; recorder of

¹ R. S. Childs, "Ramshackle County Government," *Outlook*, CXIII, 39-45 (May 3, 1916).

² J. A. Fairlie, *Local Government in Counties, Towns, and Villages*, 117.

deeds; jury commissioners; jail commissioners; prison wardens; prison inspectors; jail physicians; mercantile appraisers; election boards; superintendent of schools; director, overseer, or superintendent of the poor; superintendent of the work-house; surveyor; road or highway commissioner; boards of assessors; and boards of review.¹

CHAP.
XLIII

REFERENCES

- K. H. Porter, *County and Township Government in the United States* (New York, 1922), Chaps. v-xiv.
- H. G. James, *Local Government in the United States* (New York, 1921), Chaps. II-V.
- J. A. Fairlie, *Local Government in Counties, Towns and Villages* (New York, 1906), Chaps. iv-vii.
- , *Town and County Government in Illinois*, Report of the Joint Legislative Committee, 47th General Assembly, II, 76-132 (1911).
- W. F. Dodd, *State Government* (New York, 1922), Chap. xv.
- A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), I, 492-496.
- Annals of Amer. Acad. Polit. and Soc. Sci.*, XLVII, 1-278 (May, 1913). A series of articles on "County Government."
- G. S. Buck, "The Organization of County Government," *Acad. Polit. Sci. Proceedings*, V, 342-348 (1914).
- N. Y. Short Ballot Organization, *Documents on County Government* (New York, 1911).
- Ill. Const. Conv. Bull.* No. 12, "County and Local Government in Illinois" (Springfield, 1920).
- Mass. Const. Conv. Bull.* No. 8, "County Government in Massachusetts" (Boston, 1917).
- H. S. Gilbertson, "The New York County System," *Amer. Polit. Sci. Rev.*, VIII, 413-430 (Aug., 1914).
- W. D. Lane, "Westchester," *The Survey*, XLIII, 140-142 (Nov. 22, 1919).
- W. R. Parks, "County Government in Montana," *Nat. Mun. Rev.*, VIII, 153-157 (Mar., 1919).
- E. C. Branson, et al., *County Government and County affairs in North Carolina* (Chapel Hill, 1919).
- A. C. McIntosh, "County Government in North Carolina," *Nat. Mun. Rev.*, XIV, 96-103 (Feb., 1925).
- I. L. Pollock, "County Administration in Iowa," *ibid.*, XIII, 299-306 (May, 1924).
- Iowa Applied History*, IV (Iowa City, 1925), "County Government and Administration in Iowa."
- H. A. Barth, "Politics in South East County, Pennsylvania," *ibid.*, XIII, 360-366 (July, 1924), and "County Government in the Southwest" [Oklahoma], *ibid.*, XIV, 140-144 (Mar., 1925).

¹For an account of some of these minor offices see J. A. Fairlie, *ibid.*, Chap. vii; H. G. James, *Local Government in the United States*, Chap. III; K. H. Porter, *op. cit.*, Chap. VIII.

880 INTRODUCTION TO AMERICAN GOVERNMENT

CHAP.
XLIII

- A. B. Butts, "The County Board in Mississippi," *ibid.*, XIII, 550-553 (Oct., 1924).
- R. M. Goodrich, "The County Board in Minnesota," *ibid.*, XIII, 684-690 (Dec., 1924).
- M. E. Pidgeon, "The Power and Practice of Virginia County Boards," *ibid.*, XIV, 240-246 (Apr., 1925).
- E. Fair, "The Missouri County Board—Its Personnel and Procedure," *Nat. Mun. Rev.*, XIV, 680-686 (Nov., 1925).
- Report of Ohio Joint Legislative Committee on Economy and Taxation* (Dec., 1926), Chap. XIII.

CHAPTER XLIV

CRITICISM AND RECONSTRUCTION OF COUNTY GOVERNMENT

Twenty years ago, county government was a labyrinth whose intricate windings were known only to the professional politicians. More recently, a few disinterested explorers have penetrated the jungle in different states, notably New York, Delaware, and Illinois, and have given to the public some interesting reports of what they have found. These accounts indicate that, in general, the county has been practically untouched by the reform movements which have wrought so effectively for better government in city and state; that no state in the Union has worked out a thoroughly satisfactory system of county government; that, almost everywhere, cumbersome governmental machinery and antiquated business methods¹ persist, and divided, diffused, and diluted authority and responsibility prevail and, for the most part, pass practically unchallenged. A report of a committee on county government maintained by the National Municipal League declared, in 1917, that "county government is the most backward of all our political units, the most neglected by the public, the most boss-ridden, the least efficiently organized and most corrupt and incompetent, and, by reason of constitutional complications, the most difficult to reform." Doubtless such a sweeping indictment could not be sustained on every count in all parts of the country. But in all of our larger states one or more counties could probably be found in which all of these charges could easily be substantiated; while one or more of the allegations could be proved true of practically every county in any state.

County government not satisfactory

Specific criticisms of county government fall into four main groups, according as they relate to (1) excessive uniformity; (2) the county board; (3) other county officers; and (4) miscellaneous phases of administration.

Principal faults:

¹ See H. A. Barth, "County Government in the Southwest" [Oklahoma], *Nat. Mun. Rev.*, XIV, 140-144 (Mar., 1925); M. L. Requa, "The Government of Alameda County, California" *Annals Amer. Acad. Polit. and Soc. Sci.*, XLVII, 237-247 (May, 1913); A. E. Smith, "New York County Government Archaic," *Nat. Mun. Rev.*, XV, 399-402 (July, 1926).

CHAP.
XLIV1. Excess-
ive uni-
formity

Remedies

With the exception of a few very populous counties, all the counties in a state have the same form of government. This means that small and sparsely settled counties are compelled to maintain a needlessly elaborate and cumbersome governmental organization, whose cost is out of all proportion to the service it renders. Two or more such counties might well be consolidated, so as to save a large part of their annual expenditures. Yet county consolidation is difficult to bring about and is a rare event.¹ A possible alternative is the classification of counties, with a view to a uniform scheme of government only for those counties belonging to the same class. Counties are, indeed, now classified in Illinois, Pennsylvania, and some other states for state administrative or legislative purposes, but not for governmental organization.

Another alternative would be to institute a system of optional county charters, analogous to the optional city-charter system,² thereby enabling each county to adopt, by popular referendum, any one of several standard schemes of county government.³ Still another possibility takes the form of county home-rule charters. Under this plan the voters of a county elect a charter commission to draft a county charter, subject to the state constitution and statutes and to the approval of the voters. This plan is analogous to the well-developed municipal home-rule charter system.⁴ It however, has gained comparatively slight headway, only three states having adopted it—California, by constitutional amendment, in 1911, and Maryland and Arkansas, in a similar way, in 1915 and 1924, respectively. Five California counties, Los Angeles⁵ and San Bernardino (1913), Butte and Tehama (1917), and Alameda (1926), have framed home-rule charters under which their organization has been considerably simplified and

¹Such consolidation in New York is being urged by Governor Smith. See J. C. Young, "Governor Smith's Plan for a Modern State," *N. Y. Times*, Mar. 11, 1928.

²See p. 906.

³The new constitution adopted in Louisiana in 1921 authorizes optional forms of parochial (county) governments (Art. XIV, § 3). The Virginia commission on simplification and economy in state and local government recommended, in 1924, an amendment to the state constitution allowing the legislature to provide optional forms of county government. *Nat. Mun. Rev.*, XIV, 690 (Nov., 1925).

⁴See pp. 904-905.

⁵The Los Angeles county charter is reprinted in H. S. Gilbertson, *The County*, 219 ff. It is summarized in L. R. Works, "The Los Angeles County Charter," *Annals Amer. Acad. Polit. and Soc. Sci.*, XLVII, 229-236 (May, 1913).

unified, although constitutional obstacles have prevented radical changes.¹

CHAP.
XLIV

The county boards of supervisors in some states, especially New York, Illinois, and Michigan, are too large. The large board has in the past been supported on the theory that it is the legislative branch of county government and therefore should be representative of all important subdivisions of the county. In point of fact, however, the board has, except in Michigan, practically no legislative power beyond the right to levy taxes and make appropriations; the remainder of its work consists almost entirely of administration.

2. The
county
board

The objections to a large board are several. In the first place, such a body, made up of members from all parts of the county, can meet only at comparatively infrequent intervals, and so is not in continuous touch with what is going on in the various county offices and institutions; the running of a county is a complex administrative problem, requiring constant and active supervision. Furthermore, a large board rarely can act with a proper degree of promptness. In the second place, a large board is unwieldy as an administrative body, and is therefore obliged to leave much to be done by virtually irresponsible committees.² These are usually appointed by the chairman of the board, and not infrequently are made up, on a strictly partisan basis, with the chairmen appointed under a seniority rule which often leaves the best qualified men in positions of little or no influence. These committees look after various branches of the county administration and make their reports and recommendations to the full board, which generally

Too large

¹ An important step in the direction of county home-rule was taken in New York in 1921, when a constitutional amendment was adopted empowering the legislature to provide for new forms of government for Westchester and Nassau counties, subject to the approval of the voters in each county. See J. Fleischer, "Nassau County Plans a New Government," *Nat. Mun. Rev.*, VII, 348-353 (July, 1919); R. Moses, "Home Rule for Two New York Counties," *ibid.*, XI, 5-7 (Jan., 1922); "Two Home Rule Charters in New York State," *ibid.*, XI, 396-397 (Nov., 1922); M. C. Hamilton, "Improving Our County Government," *Amer. City*, XXX, 251-254 (Mar., 1924); W. A. Bassett, "Westchester County Government Act," *ibid.*, XIV, 119-120 (Feb., 1925); *N. Y. Times*, Feb. 25 and 26, Mar. 1, Apr. 1, 6, 11, and 26, May 17, Oct. 25, 1925; Jan. 28, Feb. 6, Mar. 9, May 12 and 21, 1926; Nov. 6, 1927. Home-rule charters have twice been rejected by the voters of Westchester county. See L. A. Tanzer, "The Defeat of the Westchester County Charter," *Nat. Mun. Rev.*, XVII, 9-11 (Jan., 1928); P. M. Cuncannon, "The Proposed Charters for Westchester County, New York," *Amer. Polit. Sci. Rev.*, XXII, 130-139 (Feb., 1928).

² In ten Illinois counties the number of committees runs from thirteen to twenty-six.

accepts and approves the action of a committee in the most perfunctory manner. If the board as a whole attempts to consider in detail any phase of county work, it soon degenerates into a debating society. In the third place, no executive head is charged with the duty of supervising and correlating the work of these committees and keeping the board informed on the needs and transactions of the various county offices; for, aside from his right to make committee assignments, the chairman of the board, with but few exceptions, has no more power than other members. Lastly, individual members of the board of supervisors are selected primarily to serve as township officers. They are county officials only secondarily. Hence there is every incentive to serve their township first; as a result, log-rolling and other evils characteristic of the ward system of selecting city councilmen abound.

One prerequisite, therefore, of more efficient county government is the abolition of the large board of supervisors and the substitution of a small body of from three to seven members, elected either at large or from very few districts. If made alone, however, this change might not result in any conspicuous improvement; a considerable enlargement of the board's powers is also desirable. In one particular after another, county boards throughout the country have had their discretionary powers taken away by mandatory statutes imposing specific duties upon them. Yet they are capable of being made to serve very useful purposes in our system of government, performing for the rural portions of the state many of the functions which city governments perform for urban populations, but which are beyond the resources of most towns and villages. The boards' legislative powers, therefore, might well be increased. A much larger degree of home rule in matters that do not transcend county boundaries would relieve the state authorities of many burdensome duties which at present are often performed very indifferently. Michigan, California, and Maryland are practically the only states in which any noteworthy beginnings have been made in this direction. Thus, the Michigan constitution and statutes have given county boards full power "to pass such laws, regulations, and ordinances, relating to purely county affairs, as they see fit, but which shall not interfere with the local affairs" of any township, city, or village within the county. County legislation of this sort must be submitted to the governor, and may be vetoed by him; but the board can override a veto by a two-thirds vote.

On the administrative side, too, the boards' powers could advantageously be enlarged, especially its appointing power and supervisory and controlling authority over other county officials and employees. Over the latter the county board now has very slight power, either of control or supervision. Such power as it does have usually takes the form of approving bonds required of newly elected officials, examining the accounts of certain officers, fixing salaries, removing the county treasurer, hearing complaints against officers and removing them if misconduct is proved. But, in the main, the board has little real control over the county administration: it can seldom demand information in writing from any official concerning the affairs of his office, and its authority to vote salaries and appropriations is rarely employed as a means of effective control.

With respect to the other county officers, it has been repeatedly pointed out that too many of them are elective, thus lengthening the ballot and tending to confuse the voter on election day. Perhaps it would be more correct to say that the voter, instead of being confused, merely votes blindly for the county ticket of one party or another. Few, if any, of these elective county offices have any political significance; that is, they possess little or no power to determine what the county government shall do. They are almost wholly administrative, and the duties of their incumbents are more or less minutely set forth in the state laws; all that these persons have to do is to find out the law relating to their particular office, and to execute it in the manner prescribed. Such offices, by their very nature, ought to be filled by appointment. So long as they remain elective, most county officials will probably continue to be chosen on a partisan basis, presumptively with reference to their views on the tariff, immigration, the League of Nations, or American relations with Mexico, although their views on these national questions seem to many people to have about as much relation to county problems as their opinions on evolution or the nebular hypothesis. As a matter of fact, there is no Republican or Democratic way of performing the duties of county treasurer, or sheriff, or prosecuting attorney, or county clerk. In California and North Dakota, and in Milwaukee county, Wisconsin, all county officials are nominated and elected on a non-partisan ballot. Unless, however, the number of elective county officers is greatly reduced, the benefits to be derived from non-partisan elections are likely to be disappointing.

To be specific, there should be a small elective county board, with greatly enlarged powers of legislation, appointment, and removal, and chosen on a non-partisan ballot if local conditions hold out any real prospect of genuine non-partisan choice. All other county officers, with the possible exception of the auditor or comptroller, should be made appointive. The coroner, in particular, should cease to be an elective official. The modern history of that ancient office is indeed "a story of political degeneracy."¹ The example of Massachusetts, Maine, New Jersey, and New York City in substituting for the coroner an appointive medical examiner, trained in medico-legal jurisprudence and acting in close coöperation with the prosecuting attorney, should be widely followed.² Better results at less cost might also follow the general transfer of coroners' duties to the prosecuting attorney, as has taken place in Jefferson county, New York.³

If these county officers ceased to be elective, where should the appointing power be lodged? The answer is that it should be distributed according to the nature of the work to be performed. First of all, the state should not only appoint but pay all so-called county officers whose chief, if not only, duty is to enforce state laws for the suppression and punishment of vice and crime, precisely as the national government appoints and pays the corresponding national officials, *i.e.*, the United States marshals, commissioners, district attorneys, and district judges. The work of the sheriff, prosecuting attorney, and county judge is really not county work at all, except geographically; in nature, it is state work. Although elected by the people of the county, these officers serve the people of the state as a whole. Their appointment, compensation, and removal by the state would tend to prevent much of the local nullification of state laws which is now so common, and would throw upon the state legislature the burden of facing any public hostility to unpopular laws. The sheriff should be appointed and made removable by the governor; the prosecuting attorney, either by the governor or by the attorney-general of the state, preferably the latter. On the other hand, clerks of courts should be appointed by the courts which they serve; and county treasurers and collec-

¹ H. S. Gilbertson, "The Coroner: a Story of Political Degeneracy," *Rev. of Revs.*, LI, 334-337 (Mar., 1915).

² A. O. Gettler, "Why the Coroner System Has Broken Down," *Nat. Mun. Rev.*, XIII, 560-567 (Oct., 1924); C. Morris, "The Medical Examiner versus the Coroner" [in New York City], *ibid.*, IX, 498-504 (Aug., 1920).

³ The coroner system in New York is discussed critically in *Report of the Special Joint Committee on Taxation and Retrenchment* (1923), 51-55.

[illegible]

Courtesy of the Milwaukee City Club

tors, assessors, superintendents of schools,¹ and all other purely county officials should be appointed, directly or indirectly, and made removable, by the county board. At the same time, all subordinates and county employees should be selected, promoted, and dismissed in accordance with carefully drawn civil service regulations. In a word, the officers having state functions should be appointed and controlled by the state, and the real county officers should be put under the full control of the county board, which would thus become, in a larger measure, the head of the county government. For the first time, responsibility for the administration of county affairs would be properly placed and unified.

But the reform should not stop here. There ought to be some effective apex to the county organization, as in the case of the city, state, and nation. This can best be supplied by a single executive officer empowered to check waste, correct abuses, institute needed changes or reforms, enforce a proper degree of harmony, coöperation, and subordination, and furnish the essential element of leadership. County boards might profitably follow the example of more than three hundred cities by appointing a manager and delegating to him the supervision of the details of county administration, including full control over subordinate county officials through the power of appointment and removal, subject to proper civil service regulations. The elective county board would then serve as the representative legislative, or policy-determining, body; and its chief functions would be to select a competent county-manager, pass upon the annual budget and tax levy, and enact such local ordinances as might be needed. Commission-manager county government might also properly include such incidents of commission-manager city government as the recall and the initiative and referendum.² Nothing short of some such wholesale reorganization will so simplify and unify our present "ramshackle county government" as to make it easily understood by the average citizen. Elective county officials must come to be so few in number, and so important and conspicuous, that the average voter can mark his ballot intelligently and know who is to blame when things go wrong.

¹ Iowa, in 1913, provided for the election of the county superintendent of schools for a three-year term by a convention consisting of the presidents of all of the local school boards of the county, a three-fourths vote being required to elect.

² See pp. 932-935. County-manager charters have been proposed and rejected by the voters in Baltimore (1920), Sacramento (1922), and San Diego

That things frequently go wrong in county administration, no one will deny. County institutions are often very indifferently managed. Jails, poor-relief, and other charitable and welfare activities show urgent need of consolidation under a department with an expert at its head. "The American county jail," says an eminent penologist,¹ "is recognized the world over as the peculiar disgrace of our system of criminal justice;" another authority characterizes the county jail as "the worst institution that exists in America—a school in which the uninitiated are trained in vice, immorality and crime";² while a former federal inspector of prisons declares that "a debauch of dirt, disease, and degeneracy" fitly describes eighty-five per cent of the jails throughout the country.³ Our county poorhouses have been characterized by a competent investigator as "the worst managed public business in the world," "a disgrace to the states," and a menace to the health and morals of the community.⁴

Inefficiency and needlessly expensive methods prevail widely in the transaction of county business generally and the handling of county finances in particular. In the more populous counties one often finds an excessive number of employees on the county pay-roll, owing to spoils considerations.⁵ All too frequently there

(1917, 1923). See *Nat. Mun. Rev.*, IX, 504-513 (Aug., 1920); *ibid.*, XI, 309-310 (Oct., 1922); *ibid.*, XII, 264-265 (May, 1923); and *ibid.*, XII, 345-346 (July, 1923). The new county charters proposed for Nassau and Westchester counties provided for an elected county president with powers similar to those of a city manager. See reference on p. 883, note 1; also *Amer. Year Book* (1925), 174-175. The North Carolina legislature, in 1927, authorized the counties of that state to choose between the form of government then existing and the county-manager plan. *Nat. Mun. Rev.*, XV, 730-731 (Dec., 1926); *ibid.*, XVI, 218-219 (Apr., 1927); P. W. Wager, "North Carolina to Have Better County Government," *ibid.*, 519-526 (Aug., 1927). Cf. *Amer. Polit. Sci. Rev.*, XXII, 140-142 (Feb., 1928).

¹ George W. Kirchwey, formerly dean of Columbia University Law School.

² Amos W. Butler, secretary of the Indiana state board of charities.

³ J. F. Fishman, *Crucibles of Crime* (New York, 1923). See also S. A. Queen, *The Passing of the County Jail* (Menasha, Wis., 1920); E. Abbott, *The One Hundred and One County Jails in Illinois* (pamphlet, Chicago, 1916); Chicago Community Trust, *Reports Comprising the Survey of the Cook County Jail* (Chicago, 1922); C. P. McCord, "A Survey of the Albany County (N. Y.) Jail and Penitentiary from Social, Physical, and Psychiatric Viewpoints," *Jour. Crim. Law and Criminol.*, XV, 42-67 (May, 1924); R. D. Wheeler, "The Problem of the County Jail," *ibid.*, XV, 620-630 (Feb., 1925); "Justice and the Jail," by an inmate, *Outlook*, XCII, 551-554 (July 3, 1909).

⁴ "A Move to Abolish the Poorhouse," *Literary Digest*, XC, Sept. 4, 1926, pp. 10-11; E. M. Stewart, "The Cost of American Almshouses," *U. S. Depart. of Labor Bull.*, No. 386 (June, 1925).

⁵ The introduction of labor-saving mechanical devices in some of the county offices in Cook county, Illinois, in 1924 made possible a reduction of fifty per cent (\$590,000) in the appropriations for extra employees and overtime salaries.

is nothing worthy of the name of a budgetary system;¹ illegal expenditures, made either in ignorance or in disregard of the law, are not at all uncommon; shortages were discovered not long ago in the accounts of twenty-five out of the sixty-one counties in New York. Often there is lacking anything which an ordinary business man would recognize as an accounting system, and when there is something of the kind it is seldom uniform for all the county offices. In Illinois, and probably most other states, some counties do not even keep a full record of the financial transactions of county officers. Waste and extravagance often characterize the granting of salaries or other forms of compensation by county boards and the purchase of county supplies. When a county board authorizes payment of \$108,000 for advertising the sale of lots of land for unpaid taxes amounting to \$34,000, or the payment of over \$13,000 incidental to the acquisition of \$21,000 worth of real estate, as has actually happened, the taxpayers may well feel indignant, even though they are not likely to be able to fix the responsibility.²

The pocket-book nerve is the most sensitive part of the average taxpayer's anatomy, and so it is not surprising to find that important steps have been taken to remedy loose financial methods. In Indiana a specially elected county council has taken over both the taxing and appropriating powers of the county board.³ In Iowa, Minnesota, Massachusetts, New York, Ohio, and other states, provision has been made by law for state supervision, audit, or inspection of county financial transactions. In New York, for example, the state comptroller has authority to send examiners to any county to investigate and report upon its financial condition. Out of fifty-seven counties visited by such examiners a few years ago,

¹O. G. Cartwright, "County Budgets and Their Construction," *Annals of Amer. Acad. Polit. and Soc. Sci.*, LXII, 223-234 (Nov., 1915).

²For illustrations of lax county financial methods in New York see *Proceedings of the First Conference for Better County Government in New York State* (1914), 12-16, 29-46; *Proceedings of the Conference for the Study and Reform of County Government* (3rd meeting, February 20, 1914), 10-17; *Proceedings of the Second Conference for Better County Government in New York State* (1916), 60-67; *N. Y. Times*, Jan. 1, 1928; in Michigan, see *Nat. Mun. Rev.*, IX, 696-698 (Nov., 1920); in Cuyahoga county, Ohio, *ibid.*, XIII, 387-388 (July, 1924); in Allegheny county, Pennsylvania, M. L. Faust, "County Deposits to Finance Speculative Bank," *Nat. Mun. Rev.*, XV, 14-20 (Jan., 1926). See also K. H. Porter, *County and Township Government in the United States*, Chap. XI.

³More recently the Indiana state tax commission has been empowered to revise county tax levies and to approve, or disapprove, proposed bond issues. See *Nat. Mun. Rev.*, XIV, 64, 90-95 (Feb., 1925); *ibid.*, XIV, 188-189 (Mar., 1925); F. G. Bates, "State Control of Local Finance in Indiana," *Amer. Polit. Sci. Rev.*, XX, 352-360 (May, 1926).

only four were found to have accounting methods worthy of favorable comment, and in not a single instance had there been compliance with every provision of state law relating to local financial transactions. New York, Iowa, Nebraska, and a few other states now prescribe uniform systems of account for all counties;¹ North Carolina and California require counties to follow a uniform budget system;² and about half of the states provide for periodical financial reports from local authorities to some state official, although, obviously, mere reports are of but limited advantage. In not a few instances state supervision has resulted in noteworthy improvement. But much more might be accomplished if legislative appropriations for inspectorial work were more adequate.

CHAP.
XLIV

Another serious and costly administrative defect in counties containing large cities is the existence of two sets of officers, county and municipal, who perform the same kinds of services for practically the same people. Perhaps the most striking illustration of this duplication is to be found in the case of Chicago and Cook county. Within the city limits of Chicago reside more than nine-tenths of the people of Cook county, and from them comes about the same proportion of the county taxes; nevertheless, more than a dozen different activities are substantially duplicated. No useful public purpose is served by such an arrangement; the cost of government is greatly augmented³ and the lengthened ballot im-

City and
county

¹ A. J. Peel, "Some Problems of County Government Accounting," *Amer. City*, XXX, 605-607 (June, 1924).

² *Nat. Mun. Rev.*, XVI, 428-429 (July, 1927).

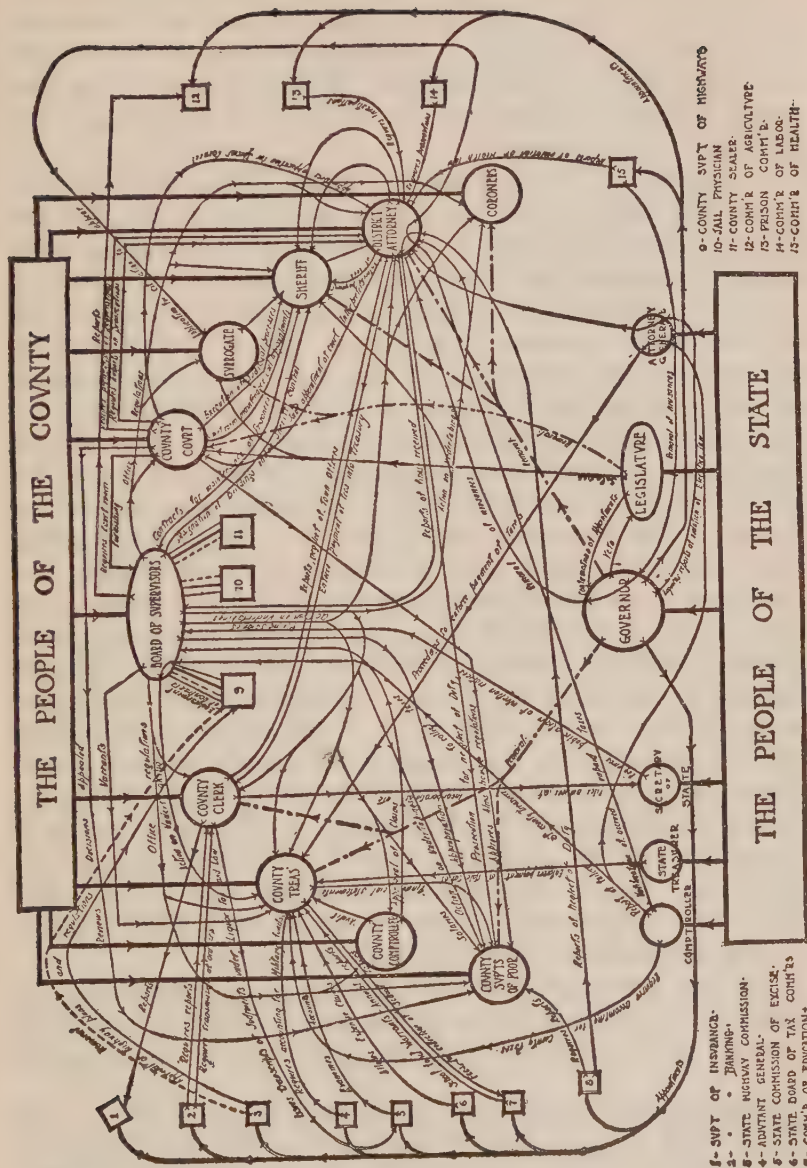
³ In 1917 it was estimated that the unification of the various governments in Cook county would result in an annual saving to the taxpayers of not less than \$3,200,000. On the Chicago-Cook-county situation see Chicago Bureau of Public Efficiency, *Unification of Local Governments in Chicago* (1917); *Illinois Const. Con. Bull.* No. 11, "Local Government in Chicago and Cook County," (1920).

On the situation in other urban counties see *Ill. Const. Conv. Bull.* No. 11, pp. 995-980 (1920); C. C. Maxey, "The Political Integration of Metropolitan Communities," *Nat. Mun. Rev.*, XI, 229-253 (Aug., 1922); T. H. Reed, "Municipal Developments in the United States and Canada," *Amer. Polit. Sci. Rev.*, XXI, 360-365 (May, 1927); Boston, *Annals Amer. Acad. Polit. and Soc. Sci.*, XLVII, 134-152 (May, 1913); *Amer. Polit. Sci. Assoc. Proceedings*, VIII, 61-72 (1911); New York City, *ibid.*, VIII, 73-78 (1911); St. Louis, *ibid.*, VIII, 97-108 (1911); *Nat. Mun. Rev.*, XIII, 605-608 (Nov., 1924); Philadelphia, Bureau of Municipal Research, *Philadelphia's Government* (pamphlet, 1924); Cleveland, *Nat. Mun. Rev.*, VIII, 551-556 (Oct., 1919); Detroit, *Public Business*, III, Nos. 2, 11 (1923-24); St. Paul, *Nat. Mun. Rev.*, XIII, 425-430 (Aug., 1924); Butte, *ibid.*, XII, 310-317 (June, 1923); Seattle, *ibid.*, XII, 691-692 (Nov., 1923); San Francisco, *Amer. Pol. Sci. Assoc. Proceedings*, VIII, 109-121 (1911); *Nat. Mun. Rev.*, XIII, 617-620 (Nov., 1924); Alameda county (Cal.), *ibid.*, XI, 204-211 (July, 1922); Los Angeles, *ibid.*, X, 7-9 (Jan., 1921); *ibid.*, VII, 163-166 (Mar., 1918); Portland, Ore., *ibid.*, XIV, 36-41 (Jan., 1925); *ibid.*, XVI, 293-295 (May, 1927); Pittsburgh, *ibid.*, XV, 518-522 (Sept., 1926); *Amer. Polit. Sci. Rev.*, XXI, 365-369 (May, 1927).

poses an unnecessary burden upon the voters. The proper remedy in such a case seems to be to place the city outside of the jurisdiction of the county officers, transferring the functions of the latter to the appropriate city departments, and to retain the county government solely for the rural or semi-urban portions of the county. Important steps in this direction have been taken in St. Louis, Denver, San Francisco, and to a less extent in Boston, New York, and Philadelphia.

Reorganization of county government and reform of the methods of transacting county business will not proceed far in most states before the discovery is made that the county cannot be treated as an isolated unit. Its relations to the townships, the school districts, the villages, and the cities within its limits must be freshly worked out in the most careful and painstaking way, and in some states will require extensive readjustment. Such changes ought to be preceded by an expert county survey, similar to the municipal surveys that have preceded the reorganization of many city governments. The survey should cover the relations of the county to the state authorities, on the one hand, and to the various political subdivisions of the county, on the other; the levy and collection of taxes, the equalization of property valuations, auditing control and accounting methods, bonded indebtedness, and purchasing methods; the registration of instruments for the transfer of property, and the care and custody of the records of such transactions; and the proper respective spheres of state, county, and local officials. These and many other matters of similar character will have to be gone into in a systematic manner, with the possible result that changes will have to be made in cities, townships, and villages if county reorganization is to be carried through successfully.

Even if the people were fully aware of the need for the changes outlined—which they are not—they are, by themselves, not in a position to effect any thoroughgoing renovation. Nevertheless they might accomplish something. An aroused public opinion might compel the county board to adopt a sort of self-denying ordinance and graft the managership upon the existing government, as a number of cities and villages have done, without waiting for special authorization from the legislature. A progressive county board might also, without waiting for legislative action, authorize an expert survey of county government and administration similar to that recently made in Delaware under the auspices of the New



This is a New York County—All Officers Elected Independently of Each Other and Co-ordinated Theoretically by Elaborate Laws. Headless, Irresponsible, Inefficient, Obscure.
(Courtesy of the National Municipal League)

York Bureau of Municipal Research.¹ Capable and progressive county officers can likewise, on their own initiative, introduce more business-like methods of handling the work of their respective offices. Sooner or later, however, the county board or the other county officials will confront the necessity of appealing to the legislature for assistance.

It would, indeed, be highly creditable to the legislature not to wait for such appeals, but to take the initiative; for it can do far more than the unaided county authorities in promoting better county government and administration. Probably no legislature is without the power to provide for an expert survey of county government, either throughout the state or in some typical counties; to authorize the employment of county managers or purchasing agents by county boards; to abolish or revise the fee system which still adheres to many county offices; to require a uniform accounting system, periodical financial reports in prescribed forms, and modern budgetary methods; and to introduce some measure of reform in the assessment and collection of taxes. Furthermore, every legislature could order a codification of all existing laws relating to the duties of the various county and local officers, to be accompanied by a handbook or manual for ready reference, thereby relieving unskilled officials of the burden of threading their way through the labyrinth of compiled statutes and confusing session laws in a more or less futile effort to find out what their duties and limitations are—a task which is not always performed satisfactorily even by the most conscientious. The legislature might also enact a civil service law for the elimination of the spoils system in connection with the subordinate positions on the county payroll, abolish any county offices created by statute and transfer their duties, and convert statutory elective offices into appointive offices, thereby hastening the advent of the short ballot.

In most states, however, "the roots of county government are imbedded in the legal granite of the state constitution and can be removed only by blasting them out with a constitutional amend-

¹ The results of the Delaware survey are set forth in C. C. Maxey, *County Administration* (New York, 1919). For a similar study of county government in North Carolina, see E. C. Branson et al., *County Government and County Affairs in North Carolina* (Chapel Hill, 1919). In 1925 the governor of North Carolina, at the request of the State Association of County Commissioners, appointed a commission on county government. The commission's report is summarized in *Nat. Mun. Rev.*, XV, 730-731 (Dec., 1926). Cf. L. D. Upson [ed.], *The Government of Cincinnati and Hamilton County* (Cincinnati, 1924).

ment." Even the most intelligent and sympathetic legislature is thus limited in what it may do to promote better county government. Not only is it restrained from shortening the ballot, by constitutional provisions making various offices elective, but it is hampered by provisions which impose a uniform type of government upon all counties, limit the amount and incidence of county taxation, restrict the amount of bonded indebtedness, and require the unnecessary and costly duplication of county and city offices. Nothing less, therefore, than a series of constitutional amendments will clear the way for that simplification and unification of county organization which is essential to truly democratic local government.

Reform proposals of such a thoroughgoing nature, however, especially if they involve even temporary inconvenience to party managers, are likely to encounter strenuous opposition; for the county is commonly the most important unit of party organization, and county government the chief base of party supplies in local political contests.¹

REFERENCES

- H. B. Gutherie, *The County: the Dark Continent of American Politics* (New York, 1917).
 ———, "The Discovery of the County Problem," *Rev. of Revs.*, XLVI, 604-608 (Nov., 1912).
 ———, "The Movement for Responsible County Government," *Annals Amer. Acad. Polit. and Soc. Sci.*, LXIV, 116-121 (Mar., 1916).
 R. B. Quinn, "Responsible County Government," *Outlook*, CXIII, 38-45 (May, 3, 1914). Reprinted in J. M. Mathews, *American State Government* (New York, 1924), 631-640.
 K. H. Porter, *County and Township Government in the United States* (New York, 1922), Chaps. XI, XV.
 H. G. James, *Local Government in the United States* (New York, 1915), Chaps. III-IV, VIII.
 J. A. Falck, "Reorganization in Counties and Townships," *Annals Amer. Acad. Polit. and Soc. Sci.*, CXIII, 187-194 (May, 1924).
 National Municipal League, *A Model State Constitution* (pamphlet, New York, 1921), §§ 55-58, pp. 39-43.
 Report of [New York] Special Joint Committee on Taxation and Retrenchment (Albany, 1923), Chaps. I-X; *ibid.* (1924), Part. III.
 E. C. Branson et al., *County Government and County Affairs in North Carolina* (Chapel Hill, 1919).
 H. E. Reed, "County Government in Oregon: A Growing Problem," *Nat. Mun. Rev.*, X, 95-102 (Feb., 1921).

¹ A. R. Hatton, in *Nat. Mun. Rev.*, 311 (June, 1923).

896 INTRODUCTION TO AMERICAN GOVERNMENT

CHAP.
XLIV

C. C. Maxey, *County Administration* (New York, 1919).

H. Bruère and L. M. Wallstein, *Study of County Government within the County of New York* (New York, 1915).

Municipal Research Bureau of Cleveland, *A Report upon the Laws Governing [Ohio] County Finances, etc.* (Cleveland, 1925).

CHAPTER XLV

THE CITY AND ITS CHARTER

Growth of
urban
populations

"City government," remarks a recent writer, "touches more people at more points and more frequently than any other branch of government." The number of people so affected increases in the United States with remarkable rapidity. In 1800 there were only six cities in the country, and their combined population was a little less than four per cent of the total;¹ in 1890 there were 444 cities, comprising thirty per cent of the aggregate population. In other words, while the population of the country as a whole increased only twelve-fold, the urban population increased eighty-seven fold, in less than a century. By 1900 a little more than forty per cent, and by 1910 more than forty-six per cent, were reported in the census statistics as living in places of 2,500 inhabitants or more. The census of 1920 showed that a tenth of our total population was at that date to be found in the three cities of New York, Chicago, and Philadelphia; that a quarter of the total population lived in the sixty-eight cities having more than 100,000 inhabitants each; and that considerably more than half of it (51.4 per cent) lived in places of more than 2,500 population. In the last census period cities increased in population seven and one-half times as fast as the non-urban areas.²

This impressive increase of urban population is of concern not only to city dwellers themselves, but to rural dwellers as well; many of the conditions and problems which directly affect city folk indirectly effect the welfare of non-urban populations. It is, for example, a matter of more than local municipal concern if an epidemic breaks out in a large city, or if a city seeks to dispose of its sewage in a stream from which the people along its course

¹ Until 1800, places having 2,500 inhabitants, or more, were classed as urban communities by the census authorities.

² An excellent brief history of American city government will be found in W. E. Miller, *The Government of American Cities* (4th ed., New York, 1925), Chap. II. A more extended account is to be found in T. H. Reed, *Municipal Government in the United States* (New York, 1926), Chaps. IV-VII. See also T. H. Reed, "American Cities Keep on Growing," *N. Y. Times*, Jan. 23, 1927.

draw their water supply, or if the criminal laws are poorly enforced by city authorities, or if city primaries and elections are disorderly and dishonest, or if the financial transactions of a city are characterized by waste and extravagance. No city, indeed—especially if it be one of considerable size—can live unto itself; the welfare, prosperity, and prestige of the cities of a state contribute enormously and in manifold ways to the welfare, prosperity, and prestige of the state as a whole.

Furthermore, in the organization of their government, and in carrying on various municipal activities, cities frequently find themselves handicapped by provisions in the state constitution or statutes, or by the peculiar legal status of cities in our political system; and under such circumstances it becomes incumbent upon the people of the state at large, through a constitutional convention, or the state legislature, or the state administrative departments, to deal with important municipal questions. Coöperation and mutual interest ought always to characterize the political relations of the urban and rural sections of a state, although much too frequently these relations are marred by suspicion, jealousy, and more or less open antagonism. In addition, it should be noted that the coöperation of even the national government not infrequently becomes necessary to the successful promotion of some important municipal undertaking or to the solution of some of the serious social problems arising in our great urban centers, such as sanitation, water supply, protection against contagious diseases, the high cost of living, poverty, overcrowding, housing, unemployment, low standards of life, physical degeneracy, and the naturalization and Americanization of alien immigrants. Truly, we are “every one members one of another.”

Legal
status of
cities

The city
charter

A city is a municipal corporation possessing the power to sue and be sued, to acquire, hold, and dispose of property, to enact ordinances, to raise money by taxation, and to exercise the right of eminent domain.¹ Every city has a fundamental law, called the charter, which defines the city's powers, outlines its organs of government, determines the method of choosing the mayor, council, and other officials, assigns to some or all officials their respective duties, and determines with varying degrees of precision the relations of these officials to one another. Some charters deal with these matters in very general terms, leaving to the city large dis-

¹ Cf. H. L. McBain, “The Legal Status of the American Colonial City,” *Polit. Sci. Quar.*, XL, 177-200 (June, 1925).

creation in arranging details by ordinances. But most charters specify with great minuteness everything that a city may do, and have become, like state constitutions, lengthy and complicated documents; the charter of Greater New York fills more than fourteen hundred printed pages.¹

Whatever its form and content, a city charter, or the authority to frame one, comes from the state legislature; and since charters differ in no essential respect from other acts of the legislature, that body has the right to grant, withhold, suspend, alter, or revoke a charter at its pleasure, even in defiance of the expressed wishes of the people of the city affected. This form of legal autocracy is, however, tempered more or less by considerations of political expediency, and also by such restrictions upon the power of the legislature as may be found in the national or state constitution. Nevertheless, it should always be borne in mind that, legally, the city, as a municipal corporation, is merely the creature of the state legislature, exercising certain delegated governmental functions, and that therefore it is absolutely under legislative control except in so far as it is protected by constitutional restrictions.²

In conferring powers on cities, legislatures have usually been parsimonious rather than prodigal; and this practice, taken with the fact that until recently the courts have been prone to construe charter provisions strictly and narrowly, has in many cases set up serious impediments to proper municipal development. Most cities are compelled to be more or less constant suppliants at the bar of the legislature for additional grants of authority for purposes not clearly covered by the provisions of their charters. The result is a serious encroachment upon the time and energy of the legislature which are needed for the consideration of matters of general, state-wide concern. How serious this encroachment is may be gathered from the fact that in New York between 1910 and 1915, out of a total of 4,260 bills passed by the legislature, 983 were special city bills; while in Massachusetts, from 1885 to 1908, the legislature passed no fewer than 400 special laws relating to the city of Boston alone.³

¹ Extracts from numerous charters will be found in T. H. Reed and P. Webbink, *Documents Illustrative of American Municipal Government* (New York, 1926).

² Cf. H. L. McBain, "The Rights of Municipal Corporations under the Contract Clause of the Federal Constitution," *Nat. Mun. Rev.*, III, 284-303 (Apr., 1914).

³ See *Amer. Polit. Sci. Rev.*, XI, 534-535 (Aug., 1917); *Nat. Mun. Rev.*, I, 182-194 (Apr., 1912); II, 597-604 (Oct., 1913); XIII, 45-46 (Jan., 1924); *Mun. Affairs*, VI, 198-211 (June, 1902).

On the other hand, many legislatures have been guilty of unjustifiable acts of aggression upon the domestic affairs of a city. Possessing virtually absolute power over rapidly growing cities, legislatures, early in our history, began to yield to the temptation to abuse their power by interfering in the internal politics and administration of one city after another in a great variety of ways. In some instances such interference has been beneficial to the city or cities affected, and, for a time at least, has been welcomed by the better class of citizens. But whether or not it has beneficent results, the principle is the same; it constitutes an infringement of the theory of home rule in municipal affairs, and is rarely if ever long accepted with entire complacency.

Dislike of such interference has found expression since about 1850 in practically all of the state constitutions. Most frequently, remedy has been sought in a clause forbidding the legislature to pass "special acts," *i.e.*, measures affecting a single city rather than all cities of the state, or, at all events, less than all cities of a specified class. In some instances such special legislation has been permitted to continue, but local interests have been safeguarded by giving the city a veto upon it, either through a popular referendum, as in Chicago, or by the action of the mayor and council, as in the cities of New York. Another mode of restriction which has been widely employed, especially in recent decades, has to do with the way in which city charters are made. Speaking broadly, five successive methods have been employed, namely, (1) the special charter system, (2) the general charter system, (3) the classification method, (4) the home-rule charter system, and (5) the optional charter plan. These methods are not mutually exclusive; sometimes two are found concurrently in the same state. Thus, New York has hitherto had the classification system, but a constitutional amendment, adopted in 1923, now sanctions the home rule plan. Obviously, the basis and character of city government depend largely on who makes the charter and what is put into it. Hence these rival systems must be carefully noted.

Where the special charter system prevails, as it still does in Massachusetts and some other older states, each city has a charter, granted to it by special act of the legislature; and there may be as many different varieties of charters as there are cities. The chief merit of this plan is that it enables each city to obtain, if the legislature is willing, the form of government and the corporate powers best suited to its size and general needs. In other

words, the system permits adaptation to varying local conditions. On the other hand, it is inherently defective in that the legislature is given practically a free hand to interfere in municipal affairs by creating or abolishing offices at the behest of local political factions or machines, or by transferring duties from elective to appointive officials, or vice versa.¹

CHAP.
XLV

The general charter system came as a reaction against the legislative abuses which have characterized the granting of special charters. For the diversity provided for in the special charter plan the general charter method substitutes uniformity; a state-wide municipal code constitutes the charter for each individual city, and all cities presumably have the same form of government and the same corporate powers. This plan has the obvious merit of simplicity, and it largely removes from the legislature the temptation to tinker with local government machinery. Nevertheless, even the most perfect municipal code will need amendment from time to time; and experience shows that one city or another will be constantly finding some change essential to its welfare. Hence the system does not, in practice, do away with special legislation or with sheer legislative meddling in local affairs, although this was its original purpose. It has, furthermore, some inherent defects, chiefly an excess of uniformity. If a state contains cities varying greatly in size, as often happens, or if some of the municipalities are inland and others are on the coast or on an important waterway, it is difficult, if not impossible, to frame a general code which will satisfactorily meet the needs all around. A form of government and a body of powers adapted to a large commercial city like Cleveland will be almost certain to prove a serious misfit for the great majority of cities in the state which are much smaller and have entirely different problems. Conversely, if the code is drawn primarily with reference to the needs of these smaller places, it is likely to prove a strait-jacket for the metropolis of the state.²

2. General
charter
plan

Probably the most satisfactory general state law designed to

¹ For Pennsylvania and Ohio examples of this sort of "ripper" legislation, as it is commonly called, see *Mun. Affairs*, VI, 212-219, 234-244 (June, 1902). More recent illustrations are afforded by the action of the New Hampshire legislature of 1921 in transferring the administration of police, streets, highways, and sewers from the city authorities in Manchester to commissions appointed by the governor, and giving to a state commission the right to veto the whole or a part of any appropriations voted by the city government. *Nat. Mun. Rev.*, X, 310-311 (June, 1921).

² M. R. Maltbie, "Home Rule in Ohio," *Mun. Affairs*, VI, 234-244 (June, 1902).

CHAP.
XLVIllinois
city and
villages act
(1872)

apply to all cities is the Illinois cities and villages act of 1872. Until 1904, practically all cities in that state, including Chicago, were governed by the provisions of this act as amended from time to time. In that year a constitutional amendment empowered the legislature to pass special legislation relating to the government of Chicago, subject to a referendum of the voters of that city before becoming effective. Yet, in most important respects, the government of this second largest city in the country is still organized under the same law that constitutes the city charter of a score or more of small cities. Illinois has, however, fairly well avoided the chief defect of the general charter plan, *i.e.*, rigid uniformity, by prescribing a certain minimum number of city officials for all cities and then empowering the city council of each city to increase the number and to decide whether the new officers shall be elected or appointed. By virtue of this elastic provision, and others, the government of Chicago has been expanded through action of the city council to meet the needs of a great metropolis. Nevertheless, despite these and other liberal features of the Illinois act, not only Chicago but many another city in the state finds itself without power to do certain things which would conduce to its welfare, and every legislature is besieged for modifications of the general municipal law.¹

3. Classi-
fication
method

The plan of classifying the cities of a state according to population and providing a different kind of charter for each class is a compromise between the two systems thus far described. The importance of taking into account the varying needs of cities differing in size and location is conceded in the provision which is commonly made for three or more classes. The legislature is left practically free to provide for each class whatever form of government, and to grant to the cities in a given class whatever corporate powers, it may see fit; but whatever governmental organization or corporate powers are granted to a class must be granted to all the cities included in that class. The legislature is thus given greater leeway in dealing with cities than under the general charter plan, but is prevented from discriminating against, or in favor

¹ This practically complete uniformity in Illinois city governments no longer exists. In 1910 the cities and villages act was amended so as to permit cities under 200,000 population to adopt the commission form of government; and again, in 1921, to permit cities of 5,000 population, or less, to adopt commission-manager government. Approximately sixty cities are now operating under these uniform commission or commission-manager amendments. It should be added that a few small cities are operating under special charters granted before the adoption of the present state constitution.

of, a particular city,¹ which is the peculiar vice of the special charter system.

CHAP.
XLV

In New York, however, where this plan is in operation, the legislature is not prohibited from passing special legislation affecting a single city or less than all the cities belonging to a certain class; but such special laws, before taking effect, must be submitted to the mayor in the three cities of the first class,² and to the mayor and council in other cities. If these local authorities approve the bill, it goes to the governor for his assent or veto; if they disapprove, it goes back to the legislature and must be repassed at the same session and approved by the governor in order to become law. This arrangement has the merit of giving the cities some protection against special legislation and the local authorities some voice in legislation affecting their cities;³ but it has by no means cured the evils of special legislation.⁴

New York
plan

In New York the classification method is expressly provided for in the state constitution, and it operates as a restriction upon the freedom of the legislature. In Pennsylvania, on the other hand, classification has resulted from judicial construction of the constitution and is tantamount to an enlargement of the powers of the legislature. The Pennsylvania constitution of 1873 prohibited the legislature from passing special laws regulating the affairs of cities and other local government units. The supreme court held that it could not have been the intention of the constitution's makers to burden a comparatively small inland city, like Scranton, with a governmental organization and corporate responsibilities primarily adapted to the needs of a great tide-water, manufacturing, and commercial metropolis with more than a million inhabitants, like Philadelphia; or, conversely, to hamper the development and prosperity of Philadelphia by a general municipal code suited to the needs of Scranton and applying alike to all cities in the state. As a result of this decision, the Pennsylvania legislature has felt free to group the cities of that state into three classes and to provide for each class a distinct type of charter.

Pennsyl-
vania plan

¹ Unless, as sometimes happens, a class contains but a single city, *e.g.*, Milwaukee in the Wisconsin system.

² New York, Buffalo, and Rochester.

³ In 1921 a legislative attempt to overthrow commission government in Buffalo was frustrated by the opportunity thus afforded the citizens to veto the acts of the legislature. See G. S. Buck, "Buffalo Insists," *Outlook*, CXXVIII, 483-484 (July 20, 1921).

⁴ On the operation of this system, see G. L. Schramm, "Special Legislation for New York Cities," *Amer. Polit. Sci. Rev.*, XVI, 102-107 (Feb., 1922).

Like most compromises, the plan of classifying cities is not altogether satisfactory. Cities of the same class, even when they have approximately the same population, seldom have exactly the same local conditions and, therefore, require different governmental arrangements and corporate powers and responsibilities. Cities, also, as they grow in population, may pass from one class to another, and thus be forced to change their scheme of government and to assume new and unnecessary burdens and responsibilities.¹ Moreover, where classification is not expressly authorized or defined in the state constitution, legislatures have sometimes resorted to ingenious and minute subdivisions of classes whereby special legislation, disguised under some general phraseology, could be enacted for a single city.² Such practices, when sustained by court decisions—as they were for a long time in Ohio—enable the legislature practically to nullify the constitutional prohibition against special legislation.

The home-rule method of charter drafting is now authorized by the state constitution in not fewer than nineteen states.³ There are also six other states where the legislature has given a broad grant of authority to some or all of its cities to amend their charters or to adopt new ones.⁴ More than two hundred cities and villages are said to be operating under home-rule charters, including fifteen of the thirty largest cities of the country. This plan goes farther than any that have been described in emancipating cities from

¹ After the result of the census of 1920 became known, the city of Reading, Pennsylvania, was obliged to change from commission government to mayor-council government, merely because its population exceeded 100,000, which is the dividing line between cities of the second and third classes in Pennsylvania. See *Nat. Mun. Rev.*, X, 4-5 (Jan., 1921).

² See *Mun. Affairs*, VI, 234-244 (June, 1902).

³ Missouri (1875), California (1879), Washington (1889), Minnesota (1896), Colorado (1902), Oregon (1906), Oklahoma (1907), Michigan (1908), Arizona, Ohio, Nebraska, and Texas (1912), Maryland (1915), Indiana (1921), Pennsylvania (1922), New York (1923), Arkansas, Nevada, and Wisconsin (1924). See F. F. Blachly, "Municipal Home Rule in Oklahoma," *Southwestern Polit. Sci. Quar.*, I, 17-34 (June, 1920); H. Barth, "Free Cities in Oklahoma," *Nat. Mun. Rev.*, XVI, 708-714 (Nov., 1927); H. L. McBain, "New York's Proposal for Municipal Home Rule," *Polit. Sci. Quar.*, XXXVII, 655-680 (Dec., 1922); R. V. Ingersoll, "Home Rule Legislation Adopted in New York," *Nat. Mun. Rev.*, XIII, 351-354 (July, 1924); L. A. Tanzer, "Municipal Home Rule in New York," *ibid.*, XIV, 246-253 (Apr., 1925); J. McGoldrick, "Home Rule in New York State," *Amer. Polit. Sci. Rev.*, XIX, 693-706 (Nov., 1925); *ibid.*, XX, 372-376 (May, 1926); C. W. Collins, "Local Self-Government and the Fourteenth Amendment," *Nat. Mun. Rev.*, III, 348-354 (Apr., 1914).

⁴ Iowa (1858), Louisiana (1896), South Carolina (1899), Mississippi (1900), Connecticut and Florida (1915). See *Ill. Const. Conv. Bull.* No. 6, "Municipal Home Rule" (1920), 406-418; O. K. Patton, "Home Rule in Iowa," *Iowa Applied History*, II, 87-210 (1914).

arbitrary legislative interference. The fundamental idea is that, inasmuch as the people of each city are the ones most interested in, and directly affected by, their municipal government and administration, they should have the right to draft their own charters and embody therein whatever plan of government they prefer, and to exercise such corporate powers as are not inconsistent with the constitution and general laws of the state. In other words, each city may make its own charter if it wishes to do so, just as each state is free to adopt its own constitution and to put therein whatever it sees fit, subject, of course, to the national constitution and laws.

CHAP.
XLV

There are different modes of framing home-rule charters, but in most states the method of procedure is to elect delegates to a charter convention (or freeholders' convention, as it is commonly called), which drafts a charter and submits it for ratification, much as a constitutional convention drafts and submits a new state constitution. As a rule, the charter goes into effect when ratified by popular vote. Amendments are usually initiated by petition and ratified by the voters.

The home-rule plan has three or four principal merits. First, it enables the people of a city to have whatever form of government they consider best adapted to their needs. In determining, too, what is best adapted they are free to experiment—a situation from which much good ought to accrue to the cities of the entire country, for every home-rule municipality is a political laboratory, or experiment station, whose results soon become known to a wide circle of communities. Second, a genuine home-rule charter plan not only gives cities greater freedom in governmental organization but confers upon them the right to perform any functions not forbidden by the constitution or general laws of the state. Thus relieved of the necessity of constantly begging the legislature for new grants of authority, each city is left practically free to undertake those new municipal enterprises which are everywhere becoming necessary for the welfare of the community. Third, municipal home-rule benefits the state legislature by relieving it of the necessity of considering a multitude of local questions which it is poorly prepared to pass upon intelligently, even if it had unlimited time. Better opportunity is thus gained for the consideration of matters of importance to the state as a whole. Finally, home rule stimulates greater interest of citizens in their own local government. If things go wrong, they cannot lay the blame upon the

Advantages

legislature. Their government may be good, bad, or indifferent, but it is what it is because the majority of the voters are content to have it so; in them alone resides the power to change conditions at any time. The home-rule plan thus serves as an important agency in bringing home to city voters their political responsibilities in local affairs.

An optional, or alternative, charter system has come into favor recently in a few states. This plan introduces a sort of à la carte charter service by incorporating in the general law of the state several standard types of charter providing for different forms of government, including the commission form, the commission-manager plan, and sundry varieties of the mayor-council type, and permitting each city to select for itself a form of government from the varieties thus offered. A New York law of 1914 authorizing the choice of any one of six standard types of charter was upheld as constitutional by the court of appeals in 1917. Massachusetts enacted a similar law in 1915, allowing choice among four forms; and this law is now in operation. North Carolina and Virginia also have optional charter laws. Obviously, this alternative, or optional, charter system, with its high degree of flexibility, has many real advantages; and it is hard as yet to discern any serious drawbacks to it. It is designed to avoid the disadvantages of both a uniform municipal code and the special charter system, without allowing such a degree of freedom as exists under the home-rule plan. In this last respect the system meets the objections of those opponents of municipal home rule who feel that the freedom provided for in that system is liable to serious abuse.

After all, it must be recognized that no one of the plans for relaxing legislative control makes the city entirely free. Even under the most thoroughgoing home-rule system, locally-made charters are subject to the general state laws, and the legislature, if it cares to use its power, can encroach indefinitely upon the city's freedom.¹ This must inevitably be so. For the city is in the state, is a part of the state, and is inextricably interlocked with the state in its interests and duties. Even if the legislature is disposed to leave the city entirely free to deal with purely local matters as it desires, there is not always a clear line of demarcation between things which are wholly local and those which, while perhaps

¹ See G. B. Noble, "Fight Against Encroachments upon Home Rule in Oregon," *Nat. Mun. Rev.*, XIV, 186-187 (Mar., 1925); also *ibid.*, XII, 694-695 (Nov., 1923).

primarily local, transcend city boundaries and concern the people of other portions of the state. In connection with elections, police, health protection, methods of taxation, and school administration, for example, the legislature can hardly be expected to make such a surrender of its powers as will prevent it from intervening to restrict municipal authority in ways which may not be locally acceptable. Nevertheless, despite its limitations, wherever the home-rule system has been fairly tried it has greatly lessened the danger of unjustifiable legislative intermeddling in municipal affairs.

The main object of all of these different plans of charter-framing, except the special-charter system, is to reduce to a minimum arbitrary or factious legislative interference with local autonomy. This end may, however, be partially attained in a manner quite dissociated from any method of granting or obtaining charters, namely, through administrative supervision over certain municipal activities by state officers or boards such as is secured, for example, in France through the supervision of communal affairs by the national government's principal local representative, the prefect of the department.¹ Beginnings in this direction have already been made. In New York the state civil service board is authorized to exercise direct supervision over the work of local civil service commissions, and in Massachusetts the state civil service commission has entire charge of the administration of the civil service law in all cities. Again, several states have placed the supervision of the enforcement of their election laws in the hands of a state official or board, in order to check local abuses.² Similarly, state boards of health or education, state finance departments or commissions, and state public utilities or public service commissions have, in a number of states, taken over in recent years many of the functions previously performed by the state legislature. A number of states go so far as to provide for state auditing of municipal accounts, and require the adoption of a uniform system of book-keeping in all cities and the making of regular financial reports in a specified form to the state auditor or some other state authority.³ Whenever, furthermore, a problem of public service trans-

CHAP.
XLV

Adminis-
trative
supervision
of municip-
al affairs

¹W. B. Munro, *The Government of European Cities* (rev. ed., New York, 1927), Chap. XII.

²*E.g.*, the state superintendent of elections in New York. This office was abolished in 1921 and its duties were transferred to local election officials.

³W. Kilpatrick, "State Supervision of Municipal Accounts," *Nat. Mun. Rev.*, XII, 247-254 (May, 1923); J. N. Bayne, "Saskatchewan's Centralized Supervision of Municipalities Gives Satisfaction," *ibid.*, XV, 689-693 (Dec., 1926).

cends in scope the boundaries of several adjacent municipalities, there is a natural tendency to call in state administrative control; under these circumstances we are apt to find such metropolitan park, sewerage, or police boards as exist in Massachusetts, with authority over the metropolitan district of Boston.

As a rule, state administrative supervision on these lines has proved far more beneficial to the cities directly affected by it than has legislative supervision. In contrast with the amateurish, capricious, and often unintelligent regulation by the legislature, administrative control affords at least the opportunity for supervision by experts possessing, or in a position to acquire, exact knowledge of the problems with which they have to deal, and capable of developing a more or less consistent and permanent policy. The possibilities of administrative supervision have, however, only fairly begun to be realized. Their development is impeded by deeply rooted devotion to the principle of local home rule. Besides, much of the state supervision which we have had has been conducted through more or less independent and uncorrelated administrative boards or commissions whose effectiveness is frequently impaired by the influence of political considerations.

In order to unify and harmonize administrative supervision, it has been forcefully urged¹ that in each state there should be created as a part of the general governmental system a department of municipal affairs, or local government, whose function it would be (1) to secure a general unified system of municipal government, subject to variations to suit the needs of different localities; (2) to secure the employment of skilled legal, financial, engineering, and medical advisers on all aspects of municipal administration; (3) to link up public health and educational activities with other vitally related functions, such as city-planning, housing, and recreational facilities; (4) to bring about the proper control of local finances and public utilities; (5) to facilitate closer coöperation between adjacent cities having common problems; and (6) to render valuable service to all the cities in the state by conducting expert investigations and giving free expert advice from a central department. Small cities, in particular, are not in a position to employ men of high skill, and are frequently led into error and wasteful expenditure; and, although many of their local problems are alike, they generally act independently, and often in complete ignorance

¹ T. S. Adams, in C. S. Bird, *Town-Planning for Small Communities* (New York, 1917), 327-330.

of the experience of other cities.¹ They would be specially helped by the central agency suggested.

CHAP.
XLV

REFERENCES

- W. B. Munro, *Municipal Government and Administration* (New York, 1923), I, Chaps. VIII-IX.
- , *The Government of American Cities* (4th ed., New York, 1926), Chaps. I-VI.
- F. J. Goodnow and F. G. Bates, *Municipal Government* (New York, 1919), Chaps. VI-VII.
- W. Anderson, *American City Government* (New York, 1925), Chaps. I-VI.
- T. H. Reed, *Municipal Government in the United States* (New York, 1926), Chaps. I-IX.
- A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), I, 273-276.
- C. A. Beard, *American City Government* (New York, 1912), Chap. II.
- III. *Const. Conv. Bull.* No. 6, "Municipal Home Rule" (Springfield, 1920).
- H. L. McBain, *The Law and the Practice of Municipal Home Rule* (New York, 1916).
- N. Mathews, *Municipal Charters* (Cambridge, 1914).
- E. S. Griffith, *The Modern Development of City Government in the United Kingdom and the United States*, 2 vols. (New York, 1927).
- W. Anderson, *Charter-Making in Minnesota* (Minneapolis, 1923).
- , "The Federal Government and the Cities," *Nat. Mun. Rev.*, XIII, 288-293 (May, 1924).
- A. M. Holden, "Recent Tendencies in Charter-Making," *Amer. Polit. Sci. Rev.*, X, 97-103 (Feb., 1916).
- H. B. Woolston, "Municipal Zones: a Study of Legal Powers of Cities Beyond Their Incorporated Limits," *Nat. Mun. Rev.*, III, 465-474 (July, 1914).
- A. W. Macmahon, *Statutory Sources of New York City Government* (New York, 1923), Chap. II.
- Report of the New York Charter Commission* (New York, 1923).
- H. N. Shepard, "The Thraldom of Massachusetts Cities," *Nat. Mun. Rev.*, I, 182-194 (Apr., 1912).
- L. A. Tanzer, "Legislative Interference in Municipal Affairs and the Home-Rule Program in New York," *ibid.*, II, 597-604 (Oct., 1913).
- R. C. Brooks, "Metropolitan Free Cities," *Polit. Sci. Quar.*, XXX, 222-234 (July, 1915).
- M. Fesler, "The Progress of Municipal Home Rule in Ohio," *Nat. Mun. Rev.*, V, 242-251 (Apr., 1916).
- F. E. Horack, "Special Municipal Legislation in Iowa," *Amer. Polit. Sci. Rev.*, XIV, 423-445 (Aug., 1920).
- R. N. Baldwin, "St. Louis' Successful Fight for a Modern Charter," *Nat. Mun. Rev.*, III, 720-726 (Oct., 1914).

¹In 1919 the Pennsylvania legislature created a state bureau of municipalities. See *Nat. Mun. Rev.*, VIII, 264 (May, 1919); *Amer. City*, XXVI, 576-578 (June, 1922).

910 INTRODUCTION TO AMERICAN GOVERNMENT

CHAP.
XLV

E. Meredith, "Denver's New Charter," *Nat. Mun. Rev.*, V, 471-475 (July, 1916).

W. P. Lovett, "Detroit and Its New Charter," *ibid.*, X, 149-151 (Mar., 1921).

C. A. Dykstra, "The Pending Los Angeles Charter," *ibid.*, XIII, 148-151 (Mar., 1924). This charter was adopted in 1924.

J. H. Beale, *Selection of Cases on Municipal Corporations* (Cambridge, 1911).

CHAPTER XLVI

THE MAYOR-COUNCIL TYPE OF CITY GOVERNMENT

In whichever of the ways described in the preceding chapter a city obtains its charter, the scheme of government that it will have is almost certain to conform to one of three distinct types: mayor-council, commission, commission-manager. The principal features of the first type will be described in the present chapter, those of the second and third types in the chapter immediately following. The mayor-council form, which is still found in a decided majority of cities of more than thirty thousand inhabitants, is based on the time-honored doctrine of separation of powers, and its most distinguishing feature is the conspicuous and influential position assigned to the chief executive. This chief executive is the mayor, who, accordingly, will first occupy our attention.

American mayors are uniformly elected by direct popular vote, never by the council, as in Europe.¹ Their terms range from one year in some of the smaller cities, especially in New England, up to five years; in the largest cities, *i.e.*, New York, Chicago, Philadelphia, St. Louis, Boston, and Baltimore, it is four years, but elsewhere it is most commonly two years. Mayors generally receive some compensation for their services, varying from a mere nominal sum in small places up to \$12,000 in Philadelphia, \$18,000 in Chicago, \$20,000 in Boston, and \$25,000 in New York. In Boston and Chicago the mayor's salary is greater than that of the governor of the respective states.

As the city's chief executive, the mayor is expected to enforce the ordinances or local laws passed by the city council and to maintain order. He represents the city in its dealings with other municipalities and upon ceremonial occasions. He is sometimes given the right to pardon violators of municipal ordinances. He may also exercise more or less general supervision over the work of the various city departments, although in practice the importance

The mayor

Powers
and duties

¹ Except in some commission or commission-manager cities. See p. 927. On the position and powers of the mayor in European cities, see W. B. Munro, *The Government of European Cities* (rev. ed., New York, 1927), 132-136 (England), 285-303 (France).

of this function depends on his power to appoint and remove department heads. The tendency in charter revisions where the mayor-council type of government has been retained is to increase the mayor's power and responsibility in appointments and removals. But in the great majority of cities his appointments do not take effect until they are approved by the council. This requirement was originally designed to check a possible abuse of the appointing power by an unscrupulous mayor, but it has often facilitated the shifting of responsibility for bad appointments back and forth between the mayor and the council, and has furnished the occasion for many malodorous political trades between the mayor or his friends and the political factions represented in the council. The system is fraught with more possibilities for evil than for good, and it might well be superseded by a concentration in the hands of the mayor of entire authority and responsibility for the appointment of department heads, as has come about in New York ¹ and a few other places.

Removals

In the national government the president, as we have seen, may remove officials without any action on the part of the Senate, even though the consent of that body was necessary for the original appointment.² Many cities, however, not only require councilmanic confirmation of appointments, but make the council's consent necessary to removals. This, of course, greatly reduces the effectiveness of the mayor's removing power, correspondingly diminishes his responsibility for the proper conduct of the city administration, and is sometimes a serious obstacle to the introduction of needed reforms. The tendency in recent charters has been to discard this feature along with councilmanic confirmation of appointments. Where the power of removal resides in the mayor alone, he is in a position not only to supervise but to control all departments of the city government.³

Budget-
making

Closely related to the mayor's power over the administrative departments is the part which he frequently, although not in a majority of cities, plays in the preparation of the annual budget or financial program. This work used to be an exclusive function of the council, and in most cities it is still performed by a com-

¹ In practice, however, the mayor's power of appointment in New York City is restricted in numerous legal and extra-legal ways. See E. Harvier, "Mayor Limited in Appointments," *N. Y. Times*, January 3, 1926.

² See pp. 239-242.

³ In some states, *e.g.*, Ohio, mayors may be removed by the governor for cause. See W. H. Edwards, "Governor Donahey and the Ohio Mayors," *Nat. Mun. Rev.*, XIII, 350-356 (June, 1924).

mittee of that body; but in an increasing number of cities the budget is now drawn up by the mayor alone.¹ Where this system prevails, as in Boston, no proposal to spend the city's money can legally be considered by the council unless it emanates from the mayor; all that the council can do is to reduce or strike out recommended appropriations. In New York City the budget is prepared by the board of estimate and apportionment, of which the mayor is a member and in which he is given three votes. In many other places a tendency is manifest to allow the mayor a larger share in allocating city revenues.

CHAP.
XLVI

Furthermore, the mayor presides in council meetings in cities of Illinois and of some other states; and everywhere he is given a direct share in the enactment of such local legislation as is authorized by the city charter. He transmits to the council messages and recommendations, together with the reports of various city officials, and in all cities of the type now under consideration he may prevent or delay the enactment of ordinances, including the granting of franchises, by the use of the veto power, although his veto may usually be overridden by a two-thirds or three-fourths vote. Where the veto extends to separate items in appropriation bills, the mayor is in a position to prevent or check waste and extravagance, if he will, in the use of the city's funds. Although much more frequently exercised than the veto of the governor or the president, the mayor's veto has not contributed greatly to the efficiency of our city governments.²

In marked contrast, but contemporaneous, with the rise of the mayoralty in American cities has been the decline of the law-making branch, commonly known as the council or board of aldermen;³ and it is interesting to observe in passing that these two tendencies in municipal affairs, the exaltation of the chief executive and the decline of the legislative branch in popular confidence and esteem,

The
council:
decreased
importance

¹ D. C. Sowers, "Our City Councils: Denver—the Lengthened Shadow of the Mayor," *Nat. Mun. Rev.*, XIII, 550-553 (Oct., 1924).

² The following articles are interesting sketches of recent mayors in: New York, *Nat. Mun. Rev.*, XV, 158-165 (Mar., 1926); Detroit, *ibid.*, XV, 205-207 (Apr., 1926); Boston, *ibid.*, XV, 253-259 (May, 1926); Chicago, *ibid.*, XV, 390-394 (July, 1926); *ibid.*, XVI, 688-695 (Nov., 1927); Omaha, *ibid.*, XVI, 111-117 (Feb., 1927); St. Louis, *ibid.*, XVI, 164-170 (Mar., 1927); Philadelphia, *ibid.*, XVI, 302-309 (May, 1927); Indianapolis, *ibid.*, XVI, 684-687 (Nov., 1927); Los Angeles, *ibid.*, XVII, 27-32 (Jan., 1928); Seattle, *The Woman Citizen*, XII, 5-8 (Dec., 1927); St. Paul, *ibid.*, XVII, 203-207 (Apr., 1928).

³ In all European countries the council is the most important organ of municipal government. See W. B. Munro, *The Government of European Cities* (rev. ed., New York, 1927), Chaps. VI-VII (England), XV (France).

almost exactly synchronize with similar tendencies in the state and national governments. Why the council, which completely overshadowed the mayor and dominated the entire city administration before 1850, and still exercises important legislative powers, should today almost everywhere enjoy only a modicum of popular respect, is partly explained by the decline in the caliber of councilmen which set in about the middle of the nineteenth century when our cities were growing with unprecedented rapidity. With this growth came a corresponding expansion in the variety of municipal activities. At first, the administration of these services fell to committees of the council. But their incompetence led state legislatures very generally to strip the council of most of its administrative responsibilities and transfer them to independently chosen heads of departments, to popularly elected boards, even to state commissions, or else to entrust them to the mayor. Thus shorn of most of its former administrative functions, the council now finds its legitimate activity almost wholly restricted to the sphere of municipal legislation—a sphere which in the average city is not sufficiently broad to challenge the interest and activity of men of first-rate ability; while in the largest cities, where the opportunities for distinction in the field of local legislation are more abundant and varied, adverse political conditions usually serve to deter men of more than fair ability from entering upon service in the council. Another partial explanation of the council's decline is to be found in the common practice of electing councilmen from small districts or wards, instead of on a general ticket for the entire city.¹ The general ticket system is not without serious disadvantages, especially in our largest cities, but it could hardly prove less productive of high-grade councilmen than the ward system. Then, too, the matter of compensation, or the lack of it, enters into the explanation. Many cities either pay their councilmen nothing or allow them only nominal sums for which properly qualified men cannot afford to make the sacrifices which service in the council entails. Few facts connected with the mayor-council type of government are more to be regretted than that the council, with all its potentialities for good, should have so degenerated in many cities as to become a byword among the best citizens. It is truly "the lowest rung in the ladder of American public life," and,

¹In the 99 cities of over 30,000 population in 1916 which had a single-chamber council, 46 elected councilmen by wards, 11 at large, and 42 by a combination of the two methods.

unfortunately, few of its members ever manage to rise above it; whereas, it ought to be at once the starting-point and the incentive for long, useful, and conspicuous political careers.

CHAP.
XLVI

There is no uniformity of size among city councils; seldom, indeed, outside of Illinois,¹ does the size of the council bear any definite relation to the size of the city. New York has a board of aldermen of seventy-one members;² Chicago has a council recently reduced from seventy to fifty members; and the number elsewhere runs downward all the way to nine, even in such large cities as Denver, Detroit, Seattle, and Pittsburgh.³ Some councils, furthermore, are organized on a unicameral, and others on a bicameral, basis. The single-chamber council is found in the majority of cities, especially those with a population of less than thirty thousand; of the hundred and twenty-four cities of this description in 1916, only fifty had a bicameral council. Many cities that once followed the bicameral plan long since abandoned it, the latest large ones to do so being St. Louis, Philadelphia,⁴ and Baltimore. Today, none of our twenty-five largest cities has the bicameral form.⁵ No city that has once discarded it has ever gone back to it, for it has few, if any, advantages which are not more than offset by the vexatious delays, by the friction which frequently arises between the two chambers, and by the increased opportunities for chicanery and corruption.

Structure
of the
council

The primary function of the council is to give formal expression to the legislative will of the city through the enactment of local laws called ordinances. The scope of this ordinance power is always set forth in more or less detail in the city charter or municipal code; and no exercise thereof is valid which is not clearly authorized by some provision of the charter, or which is inconsistent with any state statute or any provision of the state or national

Legislative
or ordi-
nance,
power

¹In this state the number of council members is graduated by law according to population.

²The New York board of aldermen consists of the president of the board elected by the voters of the city at large, the five borough presidents (one elected in each borough), and sixty-five aldermen elected from single-member districts. A very frank opinion of the board of aldermen is expressed by a woman member of the board, Mrs. Ruth Pratt, in "Men Are Bad Housekeepers," *Scribner's*, CLIV, 682-688 (May, 1927).

³Most commission-governed cities have councils, or commissions, of five members.

⁴H. A. Barth, "The Philadelphia City Council," *Nat. Mun. Rev.*, XIII, 294-299 (May, 1924). *Cf.*, E. L. Barth, "Our City Councils: Chicago's Time Consumed by Details," *ibid.*, XIV, 550-554 (Sept., 1925).

⁵Except that in New York City the board of estimate and apportionment acts as a second chamber in the enactment of certain "local laws," under the recent home-rule constitutional amendment.

constitution. City ordinances fall into two main classes. The first are called contractual ordinances, because they grant special favors, privileges, or franchises, which, if accepted by the grantee, set up a contractual relation between the city and certain private persons or corporations—a relation that can legally be changed only with the consent of both parties. In this class are included franchise grants to railroads, warehouse companies, street railways, express, telephone, and telegraph companies, electric lighting, gas, and central-heating companies, and sometimes also water-supply companies.

The second class comprises purely legislative ordinances; and of these there are several different kinds: (1) ordinances relating to the organization of the city government, filling in the details which the charter leaves to be supplied; (2) ordinances relating to financial matters, such as those imposing taxes and license fees for certain occupations, authorizing loans, and making appropriations for municipal purposes; (3) ordinances initiating public improvements (often involving the exercise of the right of eminent domain), such as street-openings, widening and paving streets, laying a sewerage system, the erection of public buildings, the laying out of parks and playgrounds, and the installation of a water-supply; (4) ordinances regulating the use and lighting of streets and public places; (5) ordinances regulating the construction of buildings and billboards, usually called the building code; (6) ordinances constituting the sanitary code, including regulations for the disposal of all forms of waste, street and alley cleaning, drainage and plumbing requirements, milk distribution and food inspection, and quarantining communicable diseases; (7) ordinances protecting the public safety and morals by restricting the sale of liquor, fire-arms, and fireworks, censoring theaters and moving-picture exhibitions, and suppressing gambling and vice; (8) ordinances regulating public utility corporations by fixing rates, prescribing equipment, and regulating service. Unlike contractual ordinances, legislative ordinances are subject to modification or repeal by the council at any time.

Limitations
on the
ordinance
power

It should be borne in mind that city councils rarely or never have a perfectly free hand in dealing with subjects which clearly fall within the range of the ordinance power. All ordinances, for example, must be reasonable (although they are presumed to be so until the contrary is established in legal proceedings before some court); ordinances must not make special or unwarranted discriminations in granting privileges or imposing restrictions; they must

not unduly restrain or interfere with trade; no ordinance is valid if in conflict with any provision of the state constitution, or with any statute, or with the national constitution or laws; and all must be enacted in due compliance with the formalities prescribed in the charter. Furthermore, the legislative authority of a city is not vested exclusively in the council. Certain administrative bodies, such as the board of health, or the fire department—even single officers—are often empowered to prescribe rules within their respective fields of jurisdiction. Such rules are called regulations, in order to distinguish them from ordinances. But they are generally of the same legal force as ordinances; they are subject to the same restrictions, and are no less binding upon all citizens.

CHAP.
XLVI

Although absorbing much space in the average municipal charter and bulking large in the public eye, the legislative function of city government is much less important than the work of the administrative departments. It is the departments that manage the multiform and sometimes highly technical public services rendered by the modern municipality and carry on the daily routine of municipal business. They attend, for example, to the collection and disbursement of the city revenues, the negotiation and retirement of city loans, the organization, training, and daily work of the members of the police force and the fire department, the construction and engineering operations of the department of public works, the enforcement of health, building, and fire regulations; and they perform a multitude of other activities which affect, more or less directly, the safety, comfort, and general well-being of every citizen. This administrative work is often given scant publicity in the newspapers, and the average city dweller knows too little about it. On the other hand, political machines and special interests are fully aware of its political and pecuniary possibilities, and often resort to desperate and corrupt methods in order to control it. The older city charters gave relatively little attention to departmental organization and functions, but the more recent ones have given more adequate consideration to this important phase of city government.¹

Importance
of admin-
istrative
activities

In the organization, number, and titles of administrative departments, as in so many other respects, there is the greatest lack of uniformity. In most commission-governed cities there are five

The de-
partments

¹ On departmental organization and activities see W. B. Munro, *Municipal Government and Administration*, II (New York, 1923). On administrative organization in European cities, see the same author's *Government of European Cities* (rev. ed., New York, 1927), Chaps. VIII (England), XVII (France).

departments into which are compressed, and sometimes cramped, all the varied municipal activities; but from this the number runs up to about twenty-two in New York, and approximately thirty in Chicago and Boston. Like the size of the council, the number of departments bears little or no relation to the size of the city. In places, however, of moderate population—say from thirty thousand to one hundred thousand—one is almost certain to find at least six distinct departments. There is (1) a law department, headed by the corporation council or city attorney, and charged with the duty of giving legal advice to the mayor, council, and all city departments, prosecuting or defending all suits brought by or against the city, drawing up or approving all city contracts, and drafting municipal ordinances; (2) a department of finance, which is likely to include the offices of city treasurer, city comptroller, auditor, and tax assessors or collectors; (3) a department of public safety, including the machinery of fire, police, health, and building administration; (4) a department of public works, which is usually the largest department, with subdivisions or bureaus attending to the care of the streets, public buildings, parks and playgrounds, sewerage and water systems, and practically all the engineering work of the city; (5) a health department, charged with the enforcement of the provisions of the sanitary code; and (6) a department of education—although in numerous cities, notably in Illinois, the administration of school and library affairs is handled by more or less independent school or library boards.

In early times, and well down toward the Civil War, the various administrative departments or services were presided over by committees of the council; and this is the system which still exists and gives general satisfaction in English boroughs. In this country, however, the plan, as we have seen,¹ broke down and in its place emerged another distinctive feature of American municipal government, namely, administrative departments legally independent of the council, and presided over by persons who are seldom chosen by the council and are never members of that body. At the head of departments in which promptness of decision, the maintenance of discipline, and capacity for vigorous action are the qualities most needed, *e.g.*, the police and fire departments, one finds, ordinarily, a single commissioner. On the other hand, those activities which entail discussion, deliberation, and decision of matters in which different racial, religious, or other local factors are in-

¹ See pp. 913-914.

volved, *e.g.*, school and library administration and welfare and recreational work, are usually in charge of a board or commission. No city finds it wise or expedient to adhere to either of these arrangements to the entire exclusion of the other; each type of organization has its strong points and its limitations.

In the selection of department heads different methods are employed, and in few cities is any one method followed exclusively. Popular election, as in the case of the comptroller in New York, Philadelphia, and other cities, is probably the least satisfactory of all. Election of some heads by the council prevails in many cities. Appointment by state authorities is comparatively rare, and in theory is hardly less satisfactory than popular election; although in Boston, St. Louis, and Baltimore, where the head of the police department is selected in this way, a better type of official has been secured than formerly through local action. School or park boards are in some cities, notably Philadelphia and Pittsburgh, appointed by the judges of the local courts, a method which, theoretically at least, has little to commend it. A few cities, of which New York and San Francisco are the most conspicuous examples, have given the appointing power to the mayor without requiring councilial, or other, confirmation. In Boston the mayor designates department heads, but their appointments do not become effective unless within thirty days the state civil service commission indicates its formal approval of the persons selected. In the great majority of cities, the mayor appoints most of the department heads, but his appointments are subject to the approval of the council. Finally, because of the unfortunate part which political considerations have played in the choice of department heads, with consequent impairment of administrative efficiency, some civil service reformers have advocated selection by competitive examinations, otherwise known as the merit system. As yet, however, no city has applied this method to any considerable extent in the selection of department heads. Whether it is suited to the filling of such positions is a debatable question. For the selection of subordinates, however, including the bureau chiefs and the great mass of clerical and technical employees, and even laborers, competitive examinations are widely used; and there can be no doubt that they yield results far superior to the old spoils system in which administrative efficiency and the city's welfare were considerations entirely secondary to political influence and rewards. Indeed, the merit system has made much greater progress in the field of municipal government than

in connection with state administration. Among the 1,467 cities of the country having (1920) more than five thousand population, 330 are employing some sort of merit system. In this number are included fifty-five of the sixty-eight cities with a population of more than 100,000 and all of the twenty-five cities with a population of more than 250,000.¹

Dissatisfaction with the so-called "federal type" of city government

The mayor-council form of government is sometimes referred to as the federal type of city government, because, first appearing in Baltimore in 1796 and in Detroit about ten years later, and hence soon after the adoption of the federal constitution, it embodies a number of points which bear striking resemblance to some of the most conspicuous features of the organization of the national government. The evidence, however, of direct "influence of the federal analogy," as it has been called, is not altogether convincing, in view of the fact that there is almost, if not quite, as much similarity between the mayor-council type and the constitutional arrangements of the several states; so that it is difficult to determine whether the national government or the state governments exerted the greater influence.² In any event, upwards of a thousand cities in the United States have become convinced during the past twenty years that, however well-suited to the needs of the national government and of the state governments, checks and balances, divided responsibility and authority, and bicameral legislatures were responsible for much of the inefficiency which characterized the average American city in the nineteenth century, and,

¹ On civil service reform in city government, see M. L. Cooke, *Our Cities Awake* (Garden City, 1918), Chap. vii; W. D. Foulke, *Fighting the Spoilsmen* (New York, 1919); Governmental Research Conference, *Character and Functioning of Civil Service Commissions* (pamphlet, Ann Arbor, 1922); C. L. King, "The Appointment and Selection of Government Experts," *Nat. Mun. Rev.*, III, 304-315 (Apr., 1914); A. L. Lowell, "Administrative Experts in Municipal Government," *ibid.*, IV, 26-31 (Jan., 1915); W. B. Munro, *Municipal Government and Administration*, II, Chap. xxiv; National Municipal League, "Report of the Special Committee on Civil Service," *Nat. Mun. Rev.*, XII, 441-471 (Aug., 1923); A. M. Swanson, "The Practicability of the Merit System," *ibid.*, IV, 32-39 (Jan., 1915). L. D. White, "The Conditions of Municipal Employment in Chicago," *ibid.*, XIV, 629-636 (Oct., 1925); J. B. Kingsbury, "The Merit System in Chicago from 1895 to 1915," *Public Personnel Studies*, III, 306-311 (Nov., 1925); IV, 54-65 (Feb., 1926); IV, 154-165 (May, 1926); IV, 178-184 (June, 1926); J. F. White, "Indianapolis at Last Tries the Merit System," *Nat. Mun. Rev.*, XVI, 630-632 (Oct., 1927); L. B. Swift, "Civil Service in Indianapolis," *Good Govt.*, XLI, 113-116 (Aug., 1924). For further references see P. O. Ray, *Introduction to Political Parties and Practical Politics* (3rd ed., 1924), 600-603.

² On the "influence of the federal analogy," compare W. B. Munro, *Municipal Government and Administration*, I, 93, 103, and H. L. McBain, "Evolution of Types of City Government in the United States," *Nat. Mun. Rev.*, VI, 19-30 (Jan., 1917).

in general, serve no useful purpose in modern city government. The forms of organization which have rapidly displaced the mayor-council type in this period will be described in the following chapter.

REFERENCES

- W. B. Munro, *Municipal Government and Administration* (New York, 1923), I., Chaps. v, viii-ix, xviii-xix, xxii.
- *The Government of American Cities* (4th ed., New York, 1923), Chaps. xiv-xv, xviii-xix, xxiv.
- W. Anderson, *American City Government* (New York, 1925), Chaps. xii-xiv, xviii-xix.
- T. H. Reed, *Municipal Government in the United States* (New York, 1926), Chaps. x-xi.
- L. D. Upson, *Practice of Municipal Administration* (New York, 1926).
- A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), II, 411-415, 479-485.
- F. J. Goodnow and F. G. Bates, *Municipal Government* (New York, 1919), Chaps. ix-x.
- J. A. Fairlie, *Municipal Administration* (New York, 1901), Chaps. xvii, xix.
- , *Essays in Municipal Administration* (New York, 1908), Chaps. iv, vii.
- F. C. Howe, *The British City* (New York, 1907), Chap. iii.
- W. P. Capes, *The Modern City and Its Government* (New York, 1922), Chaps. vii-viii.
- R. M. Story, "The American Municipal Executive," *Univ. of Ill. Studies*, VII, No. 3 (1918).
- J. P. Mitchel, "The Office of Mayor" [in New York], *Acad. Polit. Sci. Proceedings*, V, 479-494 (1915).
- B. Whitlock, *Forty Years of It* (New York, 1914). Experiences of a former mayor of Toledo.
- T. L. Johnson, *My Story* (New York, 1911). By a former mayor of Cleveland.
- G. H. McCaffery, "Boston Faces Radical Charter Changes," *Nat. Mun. Rev.*, XII, 172-176 (Apr., 1923); "Boston Looks Over Its Charter," *ibid.*, XIII, 131-133 (Mar., 1924); "A Boston Charter Referendum," *ibid.*, XIII, 413-415 (Aug., 1924); "Referendum on Boston Charter Sends City Back to Old Ward System," *ibid.*, XIV, 60-61 (Jan., 1925).
- N. Mathews, "Soundness of Boston's Charter Demonstrated by Fifteen Years' Experience," *Nat. Mun. Rev.*, XIV, 663-667 (Nov., 1925).

CHAPTER XLVII

COMMISSION AND MANAGER GOVERNMENT

Defects of
mayor-
council
govern-
ment:

1. Funda-
mental

The fundamental defect of the mayor-council type of city government is the division of authority and consequent scattering of responsibility. Legislative authority, for example, is divided between the council and the mayor, and each may, with some show of right, claim that the ultimate responsibility rests with the other. In administration, likewise, authority is diffused and responsibility scattered. Administrative functions are placed in the hands of a group of officials separate and distinct from the legislative body, and formal contacts between the two arise only when the council is called upon to confirm the appointment of department heads by the mayor, to vote the annual appropriations for the work of the departments, and to pass ordinances creating, reorganizing, or abolishing departments. Because of their joint participation (usually) in the selection of department heads, the mayor and council divide responsibility for the efficiency or lack of efficiency in the city's administrative services. As the legislative body, the council has no legal right to meddle with the details of city administration. In practice, however, few city activities are found to be outside the sphere of councilmanic influence. Over and over it has been proved that the body which provides the money to carry on departmental activities will in one way or another have something to say concerning the expenditure of its appropriations.

2. Inci-
dental

The foregoing defects seem to be inherent in, if not inseparable from, the system of checks and balances, "another name for which is friction, confusion, and irresponsibility." But there are certain other shortcomings which, although not fundamental and inherent, are almost universally associated with the mayor-council form. In the first place, the council is usually a much larger body than is necessary in order to represent the various elements in the city and to transact the city's legislative business satisfactorily. Where the bicameral plan persists, the division of authority and responsibility is carried still farther, and the ordinary citizen is usually completely in the dark as to who is to blame for what passes the council

or is smothered in committee. In almost every mayor-council city there is, also, an unnecessarily large number of elective officers who have purely routine functions, all, or practically all, minutely prescribed by state law or city ordinance. Besides dividing responsibility for the city administration, the popular election of such non-policy-determining officers lengthens the ballot, confuses the voter, and serves no purpose except to enable political machines more easily to secure and retain control of the city government. To these defects must be added the evils arising from the almost universal ward system of electing members of the council, from their nomination and election by a cumbersome and expensive partisan primary and election system, from the absence of any method of quickly removing unsatisfactory officials from office, from the inability of the people to secure needed ordinances if the council fails to enact them, and from the absence of any popular veto upon legislative acts of the mayor and council which may be opposed to the best interests of the community.

CHAP.
XLVII

Not a few cities, attributing the unsatisfactory character of their government merely or mainly to these incidental defects, have simply lopped off one or more of them or, more rarely, have attempted to graft upon the old stock some of the newer political devices. Thus many cities have (a) reduced the size of the council and the number of elective officials, or (b) abolished the bicameral council, or (c) replaced the ward system with election at large, or (d) discontinued partisan primaries and substituted either nomination by petition or non-partisan primaries and elections, or (e) concentrated the appointing power in the mayor, or (f) authorized the popular referendum in the case of all franchise ordinances, or (g) have even provided for the popular initiative and referendum in connection with other ordinances; and (h) a few, indeed, have adopted the recall.¹ Such piecemeal reforms have often produced good results. But they do not go to the root of some of the most serious municipal ills.

Reformed
mayor-
council
government

Recognizing this fact, more than eight hundred cities have openly repudiated the old doctrine of separation of powers, with its checks and balances, divided authority, and diffused and diluted responsibility, and have substituted therefor either the commission or the manager form of government. The first step in

Commis-
sion gov-
ernment

¹ See B. J. Hendrick, "The Recall in Seattle," *McClure's*, XXXVII, 647-663 (Oct., 1911); F. W. Cottlett, "The Working of the Recall in Seattle," *Annals of Amer. Acad. Polit. and Soc. Sci.*, XLIII, 227-236 (Sept., 1912).

this direction was taken by Galveston in 1900. Progress was slow for a few years, but after Des Moines reconstructed its government on the commission basis in 1907 the plan spread rapidly, especially among the smaller cities of the country, although it has also been adopted in almost a hundred cities of more than 30,000 inhabitants, including seven with populations in excess of 200,000, namely, Buffalo,¹ New Orleans, Jersey City, Newark, St. Paul, Oakland, and Portland, Oregon. Commission government is now authorized by law in all but four states—New Hampshire, Vermont, Rhode Island, and Delaware.²

Commission government involves greatly simplified machinery.³ In place of a bicameral council, or the large and unwieldy single chamber, in place of a mayor and a council each having some of the powers which belong primarily to the other and each serving as a check upon the other, in place of theoretically separate and independent legislative and administrative departments, one finds a small commission, consisting usually of five members elected by popular vote and made conspicuous by the smallness of their number and the abolition of most of the remaining elective municipal offices. In this commission are concentrated all the legislative and most of the administrative authority of the city government. As the legislative body, the commission has the ordinance power enjoyed by the council in mayor-council cities, including the right to fix the tax rate and pass the annual appropriation bills. As an administrative body, it exercises all of the administrative authority which in mayor-council cities is shared by the mayor, administrative departments, and council. Each member is assigned to serve as the head of one of the five departments into which the adminis-

¹ After twelve years' experience, Buffalo, in August, 1927, voted to abandon commission government. The new charter adopted at that time provides for a mayor and fifteen councilmen, six elected at large and nine from districts. Heads of departments are appointed by the mayor with the approval of the council. Partisan elections have been restored. See H. H. Freeman, "Buffalo Adopts a New Charter," *Nat. Mun. Rev.*, XVII, 13-15 (Jan., 1928).

² Of the 1,467 cities in the United States with a population of 5,000 or more, 303, or twenty per cent, had, by November, 1923, adopted the commission plan by popular vote, although there have been very few adoptions since 1914. Fifty-three of these cities, or about seventeen per cent, have abandoned it—fifteen adopting commission-manager government, the others reverting to the mayor-and-council plan. J. G. Stutz, in *Nat. Mun. Rev.*, XIII, 3-4 (Jan., 1924). Most of the reversions have occurred in small cities, although Buffalo, Denver, Lowell, and Nashville should be noted as exceptions. On Nashville's experience, see *Nat. Mun. Rev.*, IV, 646-651 (Oct., 1915); *ibid.*, X, 156-160 (Mar., 1921).

³ See C. W. Eliot, "City Government by Fewer Men," *World's Work*, XIV, 9419-9426 (Oct., 1907).

trative work is usually divided; and the commission appoints the subordinate officials unless the selection has been left to individual commissioners or to a special civil service commission. In brief, the essence of commission government is the thoroughgoing fusion of legislative and executive functions, accompanied by a complete centralization of responsibility in the hands of a very small group of relatively conspicuous officials.

CHAP.
XLVII

The foregoing constitute the *essential* features of the commission system. But, in addition to them, certain non-essential or incidental features almost invariably appear and contribute in no small measure to the success of the plan. For example, almost everywhere the ward system has been abolished and the members of the commission are elected from the entire city—an arrangement which helps to make the office of commissioner more conspicuous and attractive.¹ Moreover, candidates for the commission are generally nominated either by petition or by non-partisan primary, and are voted for on election day by means of a non-partisan ballot.² With such extensive powers vested in a small group, it is wise for the public to retain means of direct and prompt control over the commissioners. To this end, provision is made in practically all commission-governed cities outside of Pennsylvania for the recall of an unsatisfactory commissioner and of any other elective officers, by means of a special election before the expiration of the term of office.³ Another common safeguard is the initiative and referendum, for use in connection with the enactment of ordinances.⁴ Each of these features has contributed something to the improved civic conditions which have usually followed the adoption of the commission system. It should, however, be clearly understood that, with the possible exception of the initiative and referendum, they are neither essential nor peculiar to the commission form

Incidental
features

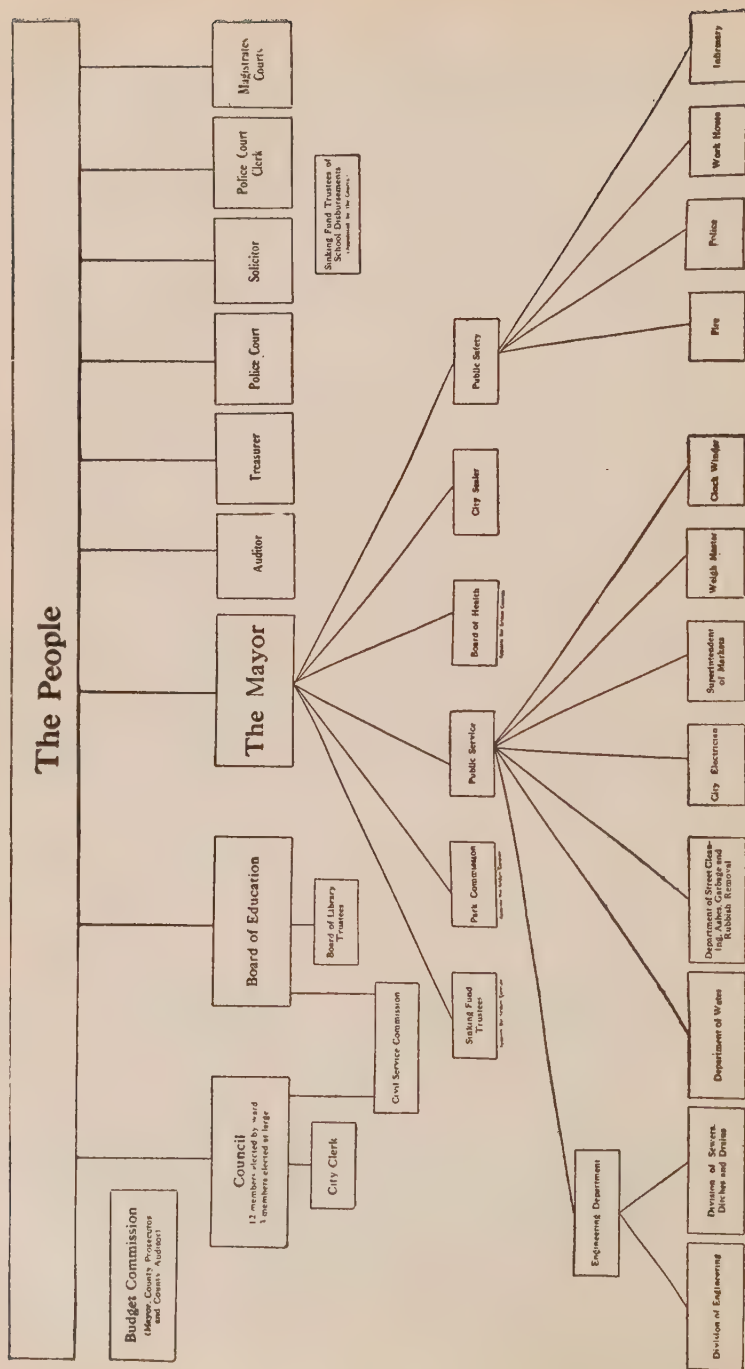
¹ In the largest cities the general ticket system, *i.e.*, election at large, is open to serious objections, and election from a few large districts seems preferable.

² Commission-governed cities in Pennsylvania had non-partisan nominations and elections from 1913 to 1919, when partisan elections were restored.

³ See E. S. Mason, "Learning to Use the Recall" [in Tacoma], *Nat. Mun. Rev.*, I, 659-661 (Oct., 1912); F. S. Fitzpatrick, "Some Recent Uses of the Recall" [in Oakland and Nashville], *ibid.*, V, 384-387 (July, 1916); F. N. Shannonhouse, "How the Recall Worked in Charlotte," *Nat. Mun. Rev.*, IX, 3-5 (Jan., 1920); A. L. Carlson, "The Recall in Sioux City, Iowa," *ibid.*, IX, 699-702 (Nov., 1920).

⁴ A large amount of information relating to the operation of the initiative, referendum, and recall in commission-governed cities will be found in *Equity*, XVIII, 162-311 (Oct., 1916).

PLAN OF THE FORMER MAYOR-COUNCIL GOVERNMENT IN DAYTON



Courtesy of Dr. L. D. Upson

of government, and that any mayor-council city can have them, as some do, without adopting the commission plan.

CHAP.
XLVII

Variations
in practice

In their laws authorizing the commission system most states have followed the so-called Des Moines plan rather closely. There is, however, naturally, a great amount of variation of detail, and some differences appear in relatively important features. For example, the term for which members of the commission are elected, though commonly two or four years, varies from one year in the case of Gloucester, Massachusetts, to six years in Wisconsin cities. Furthermore, in some cities the terms of all members expire at the same time, although the more usual arrangement is for three members to be chosen at one election and two at the next. The method of assigning administrative departments to the various members of the commission also varies. In South Carolina the assignment is made by the mayor. Most cities follow the Des Moines plan, which permits the commissioners themselves to make the assignment by a majority vote. Under the charter laws of Massachusetts, Arkansas, and Louisiana, and in a considerable number of scattered cities, however, each candidate for the commission has his name placed on the ballot as a candidate for the leadership of a particular department and is elected by the people to take charge of that department. Much difference of opinion exists as to whether this or the Des Moines method is preferable.¹

In almost all cases a mayor is still provided for. As a rule, he is elected directly to the office by popular vote, although in a few cities the commissioner who receives the highest popular vote automatically becomes mayor, and in New Jersey and Nebraska the commissioners select one of their own number. In any event, far from being the "too conspicuous and overburdened mayor" found in so many cities, he is little more than the first among equals. He wields no veto power; as mayor, he usually has no appointing power; he has no independent power of removal; he is the nominal head of the city government and acts as such on ceremonial occasions, but of actual authority he has little or no more than each of his colleagues.

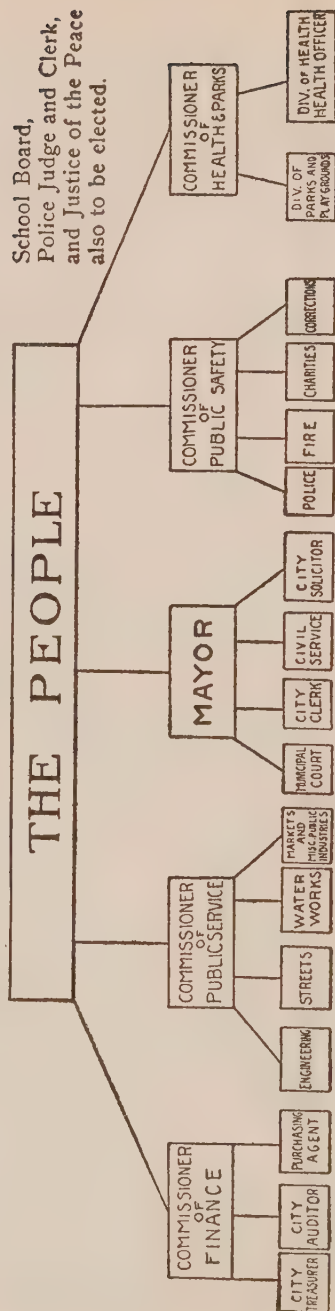
The mayor
under the
commission
form

The commission plan has much to commend it. It is, however, not satisfactory in all respects, and after trying it, perhaps ten

Defects of
the com-
mission
system:

¹ Under the Des Moines plan there are the following departments: (1) public affairs, (2) accounts and finance, (3) public safety, (4) streets and public improvements, and (5) parks and public property. See L. J. Johnson, "Commission Government for Cities: Election to Specific Offices v. Election at Random," *Nat Mun. Rev.*, II, 661-663 (Oct., 1913).

DES MOINES PLAN OF COMMISSION GOVERNMENT, APPLIED TO DAYTON



Courtesy of Dr. L. D. Upson

per cent of cities adopting it have reverted to the mayor-council form. In the first place, there is often haziness as to the place which the commission is actually to fill in the conduct of the city's affairs. The differences of opinion, already alluded to, respecting the proper method of assigning commissioners to departments arise largely from the failure of the makers of commission-government laws to discern and clearly state the true functions of the commission in relation to the administrative work of the city. If it is clearly understood that the commission's function is to serve as a general supervisory body, each member simply overseeing in a general way the administration of the particular department to which he has been assigned, but leaving the detailed conduct of departmental affairs to permanently appointed and professional administrators, the assignment of departments can properly be left to the commission. If, on the other hand, it is assumed that each commissioner will devote most of his time to the business of his department, becoming its active superintendent and director,¹ the case for election to specific offices becomes much stronger.

CHAP.
XLVII

1. Indef-
initeness
of function

Perhaps the most serious defect in commission government lies in the fact that it does not carry the concentration of authority and responsibility to its logical conclusion, but leaves them divided among the five persons who usually compose the commission. A five-headed administrative system, even supposing each head to be a real expert, makes the highest efficiency difficult, if not impossible, of attainment. Friction is certain to arise sooner or later, and from one cause if not from another. A single commissioner, for example, may stubbornly adhere to a policy of his own which is disapproved by his colleagues; or he may find himself forced by them to adopt a policy to which he is strongly opposed. What is lacking in all cities governed by the simple commission—and this is an inherent defect of the system—is an apex to the administration which will insure leadership, teamwork, and a proper degree of subordination—qualities which are as essential to efficient administration as is individual expertness.

2. Insuf-
ficient con-
centration
of respon-
sibility

Another important, though incidental, defect of commission-

¹ This appears to be both the theory and the practice in the great majority of commission-governed cities; at all events (1) where the commission-government law stipulates that members of the commission must devote a stated number of hours each day to their official duties; and (2) where large salaries are paid to members of the commission, *e.g.*, \$4,000-\$6,000 in Illinois cities with more than 40,000 population, \$7,000 in Birmingham, Ala., \$6,000 for commissioners and \$12,000 for mayor in New Orleans, and \$7,000 for commissioners and \$8,000 for mayor in Buffalo.

ELECTORATE

CITY COMMISSION
FIVE MEMBERS
ELECTED BY THE PEOPLE

CLERK
OF THE COMMISSION
APPOINTED BY
THE COMMISSION

CIVIL SERVICE
COMMISSION
THREE MEMBERS APPOINTED
BY THE COMMISSION

**CITY
MANAGER**
APPOINTED BY
THE COMMISSION

**DEPARTMENT OF
PUBLIC SAFETY**
Director Appointed
by City Manager

DIVISION OF POLICE
Bureau of Police Protection
Bureau of Detectives
Bureau of Crime Prevention
Bureau of Training School
Bureau of Police Women
Bureau of Weights & Measures

DIVISION OF FIRE
Bureau of Fire Prevention
Bureau of Hydrant Service
Bureau of Alarm & Telegraph
Bureau of Fire Fighting

DIVISION OF BLDG. INSPECTION
Bureau of Building Inspection
Bureau of Plumbing & Gas Insp.
Bureau of Structural Inspection
Bureau of Electrical Insp.

**DEPARTMENT OF
FINANCE**
Director Appointed
by City Manager

DIVISION OF ACCOUNTING
Bureau of Licences
Bureau of Assessments

**DIVISION OF RECEIPTS
AND DISBURSEMENTS**
DIVISION OF PURCHASING

**DEPARTMENT OF
LAW**
Director Appointed
by City Manager

DIVISION OF LEGISLATION
DIVISION OF LITIGATION
DIVISION OF ADVICE & OPINION

**DEPARTMENT OF
PUBLIC WELFARE**
Director Appointed
by City Manager

OFFICE OF DIRECTOR
Bureau of Legal Aid
Bureau of Free Employment
Bureau of Charities

DIVISION OF HEALTH
Bureau of Medical Service
Bureau of Laboratory
Bureau of Sanitation
Bureau of Food Inspection

DIVISION OF RECREATION
Bureau of Community Club
DIVISION OF CORRECTION

DIVISION OF PARKS

**DEPARTMENT OF
PUBLIC SERVICE**
Director Appointed
by City Manager

DIVISION OF ENGINEERING
Bureau of Sewer maintenance
Bureau of Street Lighting
Bureau of Design & Construction

DIVISION OF STREETS
Bureau of Ash & Rub removal
Bureau of Garbage removal
Bureau of Street Cleaning
Bureau of Street Repair
Bureau of Bridges & Walk main
Bureau of Transportation

DIVISION OF WATER
Bureau of Revenue collection
Bureau of Pumping & Supply
Bureau of Construction & main.

DIVISION OF LANDS & BLDGS.
Bureau of Lands & Buildings
Bureau of Motor Vehicles
Bureau of Markets

COMMISSION-MANAGER ORGANIZATION — DAYTON, OHIO.

Drawn by Detroit Bureau of Governmental Research, Inc.

Courtesy of the Macmillan Co.

government laws or charters is their stress, as a rule, upon the political, rather than the administrative, side of city government. Sections relating to nominations, primaries, forms of ballot, number and function of commissioners, and the initiative, referendum, and recall are apt to be very ample, while comparatively scant attention is given to administrative provisions which would be of the greatest help in bringing the business methods of the city up to the level of those of the best private business corporations. One seldom finds, for example, adequate provision for scientific budget-making, for modern methods of accounting and reporting, for centralized purchasing, or for numerous other important business details. The seriousness of these omissions appears when one remembers that most of the commission's work relates to matters of routine business, differing slightly, if at all, from the ordinary operations of any large business concern. In fact, the modern city is essentially a great business enterprise, combining with the primary governmental functions of protecting health, life, and property the work of a construction company, of a purveyor of water, of an accounting, auditing, and purchasing institution, and of the people's agent in dealing with public service corporations. For the proper and efficient handling of such business activities, commission government can no more spontaneously generate scientific business methods than can mayor-council government.

In view of these shortcomings, one may well be surprised at the degree of success which the commission system has attained in most places where it has been tried. The explanation is to be found in certain very obvious merits which have repeatedly neutralized the system's inherent weaknesses. There is a marked simplification of governmental machinery in comparison with what is usually found in mayor-council cities; expeditious handling of city business is facilitated; the introduction of more business-like methods is encouraged, even though not ensured; the conspicuous position of and large authority vested in the commission have served in some instances to attract into the city's service men of higher caliber than were found in the old type of city council; the fusion of the taxing and appropriating powers in the same small group tends to produce greater care and circumspection in making appropriations and preventing departmental deficits. To these general advantages might be added a long list of benefits which have appeared here and there in individual cities and under peculiar conditions. As a rule, an awakening of civic interest has accompanied the

CHAP.
XLVII

3. Over-
stress of
political
aspects

Counter-
balancing
merits

adoption of commission government and has contributed incalculably to its success. Indeed, it is often hard to apportion the credit for improved municipal conditions under the commission system, so much has been due to the awakening of civic consciousness and popular interest in city affairs as well as to the improved governmental machinery; the latter alone cannot regenerate any city.

With a view to remedying the defects of the commission system, without sacrificing any of its main advantages, a modified form has been introduced under the designation of the commission-manager—or simply the manager—system. The first large city to experiment with the new type was Dayton, Ohio, beginning in 1914. The system proving highly satisfactory there, it was soon taken up elsewhere, and in 1928 was in force, either by charter or by ordinance, in about 380 cities,¹ including twelve with population between fifty thousand and one hundred thousand, and ten with population in excess of the latter figure.² The manager plan is now (1928) authorized by law in at least thirty-five states.³

Under this scheme the small popularly elected commission is retained, with all of the powers of the commission in an ordinary commission-governed city except in the domain of administration. It enacts the ordinances and regulations for the government of the city, levies taxes, votes appropriations, creates or abolishes departments, and investigates the financial transactions or the official acts of any officer or department. It serves, however, only as the legislative, policy-determining, and general supervisory body of the city; and its members, devoting only a portion of their time to the city's affairs, are paid but a nominal sum for their services.⁴ Responsibility for the details of administration, which in commission-

¹ About half of these cities have less than 5,000 population. Only six cities have abandoned the manager plan: Hot Springs, Ark., Lawton, Okla., Waltham, Mass., Akron, Ohio, Santa Barbara, Cal., and Tampa, Fla.; and none of these has changed to the simple commission form. J. G. Stutz, in *Nat. Mun. Rev.*, XIII, 3-4 (Jan., 1924). On Akron's brief experience with manager government, see *Nat. Mun. Rev.*, XI, 73-76 (Mar., 1922); *ibid.*, XI, 183-186 (July, 1922); and *ibid.*, XII, 639-640 (Nov., 1923).

² Cincinnati, Cleveland, Dayton, Fort Worth, Grand Rapids, Indianapolis, Kansas City, Mo., Miami, Fla., Norfolk, and Rochester, N. Y. A complete list of manager cities, corrected to March, 1928, appears in *Public Management* (formerly *City Manager Magazine*), X, 245-251 (Mar., 1928. Cf., S. B. Story, "City Manager Progress," *Amer. Polit. Sci. Rev.*, XX, 361-366 (May, 1926).

³ Michigan, Florida, and California lead in the number of manager cities, with 42, 37, and 31, respectively.

⁴ See H. M. Waite, "The Legislative Body in City Manager Government," *Nat. Mun. Rev.*, XII, 66-69 (Feb., 1923); A. R. Hatton, "Jackson and Its Manager," *ibid.*, IX, 164-167 (Mar., 1920); L. J. Johnson, "Two Forms of the City Manager Plan," *Amer. City*, XXXVII, 203-205 (Aug., 1927).

governed cities is shared by the commissioners, is imposed upon a single official, the manager, who is chosen by the commission and is directly and wholly responsible to that body. Thus in place of a five-headed administrative system, administration is centralized in one responsible official. At the same time, the system makes possible a greater degree of flexibility in the administrative organization. There is, for example, no need of compressing city activities into five or any other number of departments merely to satisfy the arbitrary requirement that there shall be only as many departments as there are commissioners.¹

CHAP.
XLVII

Under this system, notwithstanding the ultimate lodgment of power and responsibility in the commission, the central figure in the city government is very clearly the manager; and to the end that the commission may secure the best manager available, choice is not restricted to a resident of the city.² Most of the city managers now in office in the larger cities began in comparatively small places in other states. Local politicians can be counted on to oppose this feature. But most citizens can appreciate the advantage of having a manager who has not been identified with any local political faction or organization. The commission ought also to be left free, and usually is, to fix the manager's salary; otherwise the city may be prevented from obtaining a properly qualified person merely because of some charter provision regulating the amount of compensation. The manager is generally appointed for an indefinite term, and is therefore subject to removal by the commission at any time when he ceases to give satisfaction.³

Selection
of the
manager

The powers and duties of the manager make him easily the most influential official in the city government; although his responsibility to the commission is always perfectly clear and absolutely

The
manager's
functions

¹In about three-fourths of the manager cities the council does not exceed five members; in Kansas City it numbers eight, in Cincinnati nine, and under the proposed Minneapolis charter eighteen, members. The Cleveland council numbers twenty-five.

²There are a few exceptions, *e.g.*, Phoenix, Arizona. In practice, a "home man" has frequently been chosen manager, notably in the case of the first manager in Cleveland, Mr. W. R. Hopkins.

³A prospective manager usually insists that the commission execute a contract to employ him at a fixed salary for a definite period. But, even so, such an arrangement can be terminated by the commission at any time, subject to an adjustment with the manager concerning the unpaid balance of the stipulated salary. Managerial salaries, in 1928, ranged all the way from \$1,200 in Devol, Okla., to \$10,000 in Berkeley and Sacramento, Cal., Hamilton, O., Portland, Me., Pontiac, Mich., Durham, N. C., Knoxville, Tenn., Petersburg, Va., and Austin, Texas; \$12,000 in Winfield, Kan., Oklahoma City, Okla., and Norfolk, Va.; \$15,000 in Kansas City, and Fort Worth, Texas; \$20,000 in Stockton, Cal., and Rochester, N. Y.; \$25,000 in Cincinnati and Cleveland.

direct, and the members of the commission are, in turn, subject to popular control through the initiative, referendum, and recall. The entire city administration revolves about the manager, who, like the centurion in the Bible, saith "to this man go and he goeth, and to another, come and he cometh." He appoints all heads of departments, and sometimes the deputy heads; he assigns to each his functions; and he may suspend or remove heads or subordinates at any time for cause. Minor employees are usually selected under a system of competitive examinations administered by a civil service commission of three members appointed by the commission. But the manager has general supervision over all of the work done in the various departments and is held responsible for results. In fact, the greater part of his time is occupied with attending to the details of city administration.¹

Next in importance, and closely related to these tasks, is the duty of keeping the commission informed on the city's financial condition, preparing the annual budget, and going over and explaining the significance of various items. Responsibility for the enactment of the budget rests, however, not with the manager, but with the commission representing the body of taxpayers. Finally, the manager is made the chief executive of the city for the enforcement of all municipal ordinances and of such state laws as the city is expected to administer. There is still a mayor, to be sure, who is usually the commissioner receiving the greatest number of popular votes; but he has even less power than in ordinary commission cities, and in reality is little more than a figure-head.²

The manager has a right to be present at all meetings of the commission, to take an active part in its deliberations, and to make recommendations to it, although he has no vote. Thus legislation and administration, the money-raising and the money-spending branches of the government, are brought into close and open relationship with one another. Members of the commission are expected to refrain from meddling in roundabout ways with administrative activities and from attempting to influence the manager

¹ See C. W. Koiner, "Why There Should Be an Assistant City Manager," *Nat. Mun. Rev.*, XIII, 670-672 (Dec., 1924); H. W. Hepner, "The Qualifications of a City Manager," *ibid.*, XIII, 539-541 (Oct., 1924); E. D. Ellis, "The City Manager as a Leader of Policy," *ibid.*, XV, 201-204 (Apr., 1926).

² On the desirability of magnifying the office of mayor in the larger managerial cities see J. W. Routh, "Thoughts on the Manager Plan," *ibid.*, XII, 176-180 (Apr., 1923). Cf., L. D. White, "Some Observations on the City Manager Plan," *Public Management*, IX, 222-229 (Mar., 1927).

in the selection of department heads and subordinates and in awarding city contracts. It must, however, be understood that manager government contains no automatic check upon this sort of thing. Nothing but the establishment of sound traditions as to the proper sphere of activity of the commission, backed by a vigilant interest on the part of the ordinary citizens, can prevent a recurrence of undesirable legislative dabbling in administrative business.

CHAP.
XLVII

The commission-manager form of government is closely modeled upon the organization of large business corporations, with the electorate corresponding to the stockholders, the commission corresponding to the board of directors, chosen by the stockholders and charged with general responsibility for the conduct of the business, and the city manager corresponding to the president or general manager, chosen by the board of directors, responsible to them, and charged with looking after all the details of the business. The results achieved appear to have been more uniformly satisfactory than in commission-governed cities: expert administrators, or persons with administrative experience in private business, have generally been secured as managers; there has been a decided improvement in general administrative efficiency; modern business methods have been introduced; financial methods, in particular, have been noticeably toned up; and last, but by no means least, politics has thus far been largely eliminated from city administration. How long this last condition will continue no one dares predict. Credit, furthermore, for these beneficial results, as in the case of commission-governed cities, has to be divided between the improved governmental organization itself and an active and continuous interest in municipal affairs on the part of a greater proportion of citizens.

Results

REFERENCES

- W. B. Munro, *Municipal Government and Administration* (New York, 1923), I, Chaps. xx-xxi.
 ———, *The Government of American Cities* (4th ed., New York, 1926), Chaps. xvi-xvii.
 T. H. Reed, *Municipal Government in the United States* (New York, 1926), Chaps. xii-xiii.
 W. Anderson, *American City Government* (New York, 1925), Chap. xiii.
 W. P. Capes, *The Modern City and Its Government* (New York, 1922), Chaps. ix-x.
 H. Bruère, *The New City Government* (New York, 1913), Chap. iv.

- C. R. Woodruff, *City Government by Commission* (New York, 1911).
- E. R. Bradford, *Commission Government in American Cities* (New York, 1911).
- T. S. Chang, *History and Analysis of the Commission and City Manager Plan of Municipal Government in the United States* (Iowa City, 1918).
- O. Ryan, *Municipal Freedom* (Garden City, 1917).
- M. A. Gemünder, "Commission Government: Its Strength and Its Weakness," *Nat. Mun. Rev.*, I, 170-181 (Apr., 1912).
- E. H. Bradford, "Financial Results under the Commission Form of City Government," *Nat. Mun. Rev.*, I, 372-377 (July, 1912).
- Experience of particular cities under commission government: Birmingham, *Nat. Mun. Rev.*, XIV, 661-663 (Nov., 1925); Buffalo, *ibid.*, VI, 79-84 (Jan., 1917); *ibid.*, IX, 93-97 (Feb., 1920); *Rev. of Revs.*, LXIII, 623-625 (June, 1921); *Outlook*, CXXVIII, 483-484 (July 20, 1921); Des Moines, *Nat. Mun. Rev.*, X, 372-374 (July, 1921); New Orleans, *ibid.*, VI, 73-79 (Jan., 1917); Omaha, *ibid.*, X, 281-286 (May, 1921); Portland, *ibid.*, XIII, 502-507 (Sept., 1924); Spokane, *ibid.*, IX, 642-647 (Oct., 1920).
- H. G. James, "The City Manager Plan," *Amer. Polit. Sci. Rev.*, VIII, 602-613 (Nov., 1914).
- H. A. Toulmin, *The City Manager* (New York, 1915).
- Mass. Const. Conv. Bull. No. 13 (Boston, 1917), "The City Manager Plan of Municipal Government."
- R. T. Crane [ed.], *Loose-Leaf Digest of City Manager Charters* (New York, 1925).
- J. A. Cohen, "City Managership as a Profession," *Nat. Mun. Rev.*, XIII, Supplement, 391-411 (July, 1924).
- R. Forbes, "Centralized Purchasing in City Manager Municipalities," *Nat. Mun. Rev.*, XIII, 631-641 (Nov., 1924); *City Manager Magazine*, VII, 186-194 (Mar., 1925).
- Yearbook of the City Managers' Association*. Published annually (Lawrence, Kan.).
- L. D. White, *The City Manager* (Chicago, 1927).
- C. E. Rightor, *The City Manager in Dayton* (New York, 1919).
- A. S. Gregg, "The City Manager Plan in Cleveland," *Rev. of Revs.*, LXXI, 517-521 (May, 1925). Results for the first year.
- National Municipal Review*, IX-X (contains, in successive issues beginning with May, 1920, and running through June, 1921, short summaries of the working of manager government in a large number of cities). More extended articles relate to Cincinnati, *Nat. Mun. Rev.*, XIII, 601-605 (Nov., 1924); *ibid.*, XIV, 69-74 (Feb., 1925); *ibid.*, XV, 465-471 (Aug., 1926); *ibid.*, XVII, 20-21 (Jan., 1928); "Circle City," Okla., *ibid.*, XVII, 22-25 (Jan., 1928); Cleveland, *ibid.*, XII, 29-35 (Jan., 1923); *ibid.*, XIII, 255-261 (May, 1924); *ibid.*, XIV, 182, 184-185 (Mar., 1925); *ibid.*, XIV, 715-721 (Dec., 1925); *ibid.*, XVII, 18-20 (Jan., 1928); 69-73 (Feb., 1928); Dayton, XII, 20-23 (Jan., 1923); Durham, No. Car., *ibid.*, XIV, 476-480 (Aug., 1925); Greensboro, No. Car., *ibid.*, XVII, 114-115 (Feb., 1928); Indianapolis, *ibid.*, XVI, 555-557 (Sept., 1927); Kansas City, *ibid.*, XIV, 207-208 (Apr., 1925); 617-620 (Oct., 1925); Knoxville, *ibid.*, XIII, 611-617 (Nov., 1924); Nashville, *ibid.*, X, 452-453 (Sept., 1921);

Newport, R. I., *ibid.*, XVI, 172-176 (Mar., 1927); Pasadena, *ibid.*, XIV, 403-406 (July, 1925); 643 (Oct., 1925); Rochester, N. Y., *ibid.*, XV, 208-211 (Apr., 1926); Sandusky, O., *ibid.*, VIII, 679-685 (Dec., 1919); Stratford, Conn., *ibid.*, XIV, 82-85 (Feb., 1925); Wichita, Kan., *ibid.*, IX, 275-279 (May, 1920).

CHAPTER XLVIII

PROTECTIVE ACTIVITIES OF THE CITY

In preceding chapters city government has been described with respect to its form or structure. We now turn to municipal functions and activities. Speaking broadly, these are the same, whatever the structure of the governmental system. And yet organization and function are intimately related. For, after all, machinery is only a means to an end, namely, the proper performance, not only of the more obvious and primary functions of all governments—the protection of life and property—but also of all those varied business and social-welfare activities which vitally affect the daily life of citizens. Indeed, the greater part of the work of city government consists in serving as an agency for the satisfaction of a great variety of daily human wants which can be better met through public than through private means.

When entire volumes have been written on single phases of city activities, a brief chapter or two can, of course, give only the barest outline of the subject. No very satisfactory classification is possible, because many activities fall partly in one field and partly in another. But for convenience the city's organized efforts may be divided into five main groups, according as they relate to (1) protection of life and property, (2) public works, (3) social welfare, (4) education, and (5) finance. In the present chapter we shall speak only of those activities which are comprised in the first of these classes; which means to confine attention to three great protective agencies, the police, fire, and health departments.

Municipal police forces vary in size from twenty or thirty patrolmen in cities of from ten to thirty thousand up to small armies of about 5,000 in Philadelphia, over 6,000 in Chicago, and over 14,000 in New York. Although legally officers of the state, and largely occupied with the enforcement of state laws, the police are practically everywhere organized, appointed, paid,¹ and con-

¹L. V. Harrison, "Expenditures for Police Service," *Nat. Mun. Rev.*, XVI, 638-642 (Oct., 1927); A. Vollmer, "Police Organization and Administration," *Public Management*, X, 140-151 (Mar., 1928).

trolled by municipal authorities.¹ At the head of the police department one usually finds a single commissioner, called the police commissioner or the superintendent of police, who may be either a layman with little or no knowledge of police affairs when he assumes office or a professional member of the force who has risen from the ranks. Sometimes, however, police administration is placed in the hands of a small appointive bi-partisan board, especially in the smaller cities. This is about as unsatisfactory an arrangement as can be devised, since it divides responsibility, prevents prompt and energetic action, weakens discipline, and furnishes an opportunity for the entrance of all sorts of back-door influences.

Below the chief or head of the department are deputy chiefs in the larger cities, captains, lieutenants, sergeants, and patrolmen. The last constitute the great majority, and the backbone, of the force. Upon their efficiency largely depends the character of the entire police administration of the city. The force, thus organized along military lines, is apportioned to the various precincts of the city, in each of which there is a station-house serving as police headquarters. Policewomen are now also to be found in numerous cities, including Chicago, Los Angeles, and Detroit. To them are assigned special duties connected with the supervision of dance halls, rest rooms in department stores and other public places, railway stations, and moving-picture theaters. Police matrons are also now commonly found at police stations to care for women offenders.²

In every large city the police department has numerous functions to perform, and this has led to the organization of specialized squads. First and most important of police duties is patrolling the streets, day and night, for the prevention of crime. For this work not less than eighty per cent of the entire force ought to be available during any twenty-four-hour period. When a crime has been committed, and the perpetrator is unknown, a second police function comes into play, namely, the discovery and arrest of the criminal, and the collection of evidence relating to the offense. In a

Specializa-
tion of
functions

¹In Boston, St. Louis, Kansas City, and Baltimore the organization and control of the police force has for a good many years been vested in a single commissioner or a board appointed by the governor. Police affairs have likewise been administered by state boards at one time or another in other cities, notably New York and Chicago. But the system is usually resented as a violation of the principle of home rule.

²M. E. Hamilton, *The Policewoman* (New York, 1924); C. Owings, *Women Police* (New York, 1926); L. Brownlow, "The Policewoman and the Woman Criminal," *Nat. Mun. Rev.*, XVI, 467-468 (July, 1927).

large city this falls to detectives or plain-clothes men. Detective work may be assigned to a few regular patrolmen or sergeants in each police precinct; or it may be centralized in one office, called the detective bureau, and handled by men who devote their entire time to it. In large cities, too, one finds a mounted squad and a motorcycle squad to assist patrolmen in handling street traffic and exceptional throngs of people. Sometimes there is also a harbor squad to patrol the waterfront in small boats. The department regularly has to look after the telephone patrol-boxes, and the flashlight and ambulance systems, which are essential in large cities; and it also sometimes has the care of the city jail, the granting of certain licenses, the canvassing of voting lists, and the enforcement of numerous and varied regulations issued by the health and fire departments.

Appointments to the police force used to be distributed by the successful party or faction as rewards for the political services of ward leaders and other local politicians, in accordance with the well-known standards of the spoils system. Now, however, in most large cities, and happily in not a few smaller ones, this practice has been largely supplanted by a system of competitive examinations.¹ Where honestly administered, the merit plan has tended to reduce political favoritism and to improve the general character and efficiency of the service. Recognizing the need for special training for the proper performance of police duties in a large city, New York, Chicago, and a score of other municipalities, following the example of London, Vienna, and Paris, have organized training schools for newly appointed police recruits.² The problems of police promotion and discipline, however, have not as yet found any very satisfactory solution.

In no branch of city administration are there greater opportunities for corrupt influences to make themselves felt than in the police force of a large city. It is therefore something more

¹ H. W. Marsh, "Civil Service and the Police," *Nat. Mun. Rev.*, X, 286-291 (May, 1921); E. M. Martin, "An Experiment in New Methods of Selecting Policemen," *ibid.*, XII, 671-681 (Nov., 1923); also see *ibid.*, XVI, 719-723 (Nov., 1927); F. Telford and F. A. Moss, "Suggested Tests for Patrolmen," *Public Personnel Studies*, II, 112-144 (July, 1924); *ibid.*, IV, 122-151 (Apr., 1926).

² C. F. Cahalane, *Police Practice and Procedure* (New York, 1914); *ibid.*, *The Policeman* (New York, 1923); "New York's New School for Criminal Catchers," *Literary Digest*, LXXXIII, Nov. 22, 1924, pp. 40 ff.; H. G. Schutt, "Advanced Police Methods in Berkeley," *Nat. Mun. Rev.*, XI, 80-85 (Mar., 1922). The New York police school, as reorganized in April, 1925, is called the "Police Academy," and is designed to be "the West Point of the Department." See *N. Y. Times*, April 22, 24, 25, 26, 1925.

than a mere coincidence that in practically every startling revelation of political corruption connected with city government the police force has been more or less deeply involved. "All the lawless elements of the city which derive profit from their respective trades are willing to share their ill-gotten gains with the police in return for protection" or immunity from prosecution.¹ The opportunities for corruption are especially great when the police are expected to enforce laws which do not reflect the sentiment or moral standards of the community, as in the case of laws prohibiting the sale of liquor, or requiring the Sunday-closing of saloons, stores, theatres and other amusement places, and those prohibiting gambling and the social evil.²

The criminal courts must also be mentioned as essentially an integral part of the police system.³ They are provided for either in the city charter or in the general state laws. The judges in these "police courts" are usually elected by popular vote, which in reality often means that their selection is largely determined by political bosses and organizations supported by elements which are ready to pay for immunity from the enforcement of the criminal laws. Because of unfortunate experiences of this nature, popular election has been abandoned in New York and some other cities, and police magistrates are now appointed either by the mayor or the governor, with somewhat more satisfactory results.⁴ The

CHAP.
XLVIII

Criminal
courts and
the police

¹ G. H. Putnam, "Conditions of Vice and Crime in New York and the Relation of These to the Police Force of the City," *Nat. Mun. Rev.*, II, 408-415 (July, 1915); O. H. P. Garrett, "Why They Cleaned Up Philadelphia," *New Republic*, XXXVIII, 11-14 (Feb. 27, 1924); A. F. MacDonald, "General Butler Cleans Up," *Nat. Mun. Rev.*, XIII, 367-373 (July, 1924); "General Butler's Dramatic Exit," *Literary Digest*, LXXXVIII, Jan. 9, 1926, pp. 10-11; B. Smith, "A Municipal Program for Combatting Crime," *Nat. Mun. Rev.*, XVII, 33-39 (Jan., 1928).

² R. B. Fosdick, *American Police Systems*, Chap. I.

³ In addition to the police courts, the larger cities commonly have special municipal courts to handle civil cases.

⁴ A. M. Kales, "Methods of Selecting and Retiring Judges in a Metropolitan District," *Annals Amer. Acad. Polit. and Soc. Sci.*, LII, 1-12 (Mar., 1914). W. McAdoo, "The Administrative Reorganization of the Courts in New York City," *Acad. of Polit. Sci. Proceedings*, V, 198-216 (Apr., 1915). Detroit's criminal courts were reorganized in 1920: see *Nat. Mun. Rev.*, IX, 345-348 (June, 1920); *ibid.*, X, 550-553 (Nov., 1921). In San Francisco, under a charter amendment adopted in November, 1920, the mayor nominates the police judges as vacancies arise or terms expire, and the voters approve or reject these nominations at the next regular election. See E. H. Wilson, "London's Courts Compared with New York's," *Jour. Amer. Judic. Soc.*, XI, 118-119 (Dec., 1927).

In 1921 a survey was made of the administration of criminal law in Cleveland. See Cleveland Foundation, *Criminal Justice in Cleveland* (Cleveland, 1921); R. Moley, "Civic Interest and Crime in Cleveland," *Nat. Mun. Rev.*, XII, 580-585 (Oct., 1923).

spirit and methods of the judges in the criminal or police courts have much to do with the effectiveness of police administration. Magistrates with an academic knowledge of the law, and without an intimate acquaintance with the habits of criminals and the difficulty which policemen encounter in securing absolutely legal proof in all cases, may destroy the zeal of a force by allowing notorious criminals to escape on technical grounds." On the other hand, "a magistrate too closely in sympathy with the police force and incapable of taking a detached view may err on the side of bureaucracy and help to cultivate in the force a spirit of contempt for the rights of the citizen, particularly when the citizen happens to be a poor man. This aspect of judicial tyranny has been illustrated many times in the case of strikes, when peaceful picketers have been arrested on charges of 'disorderly conduct' and railroaded to the workhouse by intolerant judges."¹ The system of admitting to bail persons accused of serious crimes is often abused, so that it reacts unfavorably upon the vigilance with which the police run down and apprehend violators of the law.

In the past two decades noteworthy progress has been made in our cities in discriminating between various classes of offenders² and providing special courts for dealing with each class. For example, many, if not all, of our larger cities now have juvenile courts, under one name or another, for dealing with youthful offenders.³ Some of these, like the juvenile court of Denver, presided over by Judge Ben B. Lindsey, have attracted nation-wide attention. Then there are so-called morals courts for dealing with social vice, and domestic relations courts to which are brought persons charged with the non-support or abandonment of wives, children, or poor relations.⁴ Speeders' courts, as the name implies,

¹ C. A. Beard, *American City Government*, 173-175; G. W. Alger, "The Police Judge and the Public," *Outlook*, XCVI, 356-364 (Oct. 15, 1910).

² G. Everson, "The Forgotten Army," *Outlook*, CXIX, 343-353 (June 26, 1918).

³ T. D. Eliot, *The Juvenile Court and the Community* (New York, 1914); K. F. Lenroot and E. O. Lundberg, "Juvenile Courts at Work," U. S. Dept. of Labor, *Children's Bureau Publications*, No. 141 (Washington, 1925); H. H. Lou, *Juvenile Courts in the United States* (Chapel Hill, N. C., 1927); A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, I, 500-502; G. G. Battle, "The Newer Justice," *Rev. of Revs.*, LXVIII, 417-419 (Oct., 1923).

⁴ C. W. Collins, "The Pittsburgh Morals Court," *Nat. Mun. Rev.*, X, 413-416 (Aug., 1921); G. E. Worthington, *The Women's Day Court of Manhattan and the Bronx* (New York, 1922); G. E. Worthington and R. Topping, *Specialized Courts Dealing with Sex Delinquency* (New York, 1925).

handle cases involving infractions of the ordinances regulating the driving of automobiles.

CHAP.
XLVIII

Many a person arrested for a crime or misdemeanor has been found to be sub-normal, either mentally or physically, or both; and this sub-normality has a most important bearing upon the question of his responsibility and punishment. Such cases require special investigation and, after all the facts are known, special treatment. In some of our larger cities the ascertainment of these facts has been assigned to psychopathic laboratories, institutes, or hospitals, which are proving to be valuable adjuncts to the criminal courts, especially in the case of sub-normal young persons.¹

Psycho-
pathic lab-
oratories

In the matter of punishments also, especially of persons convicted of minor offenses, considerable progress has been made in the past few years. The parole system, involving the release of prisoners on probation, has been widely adopted, with conspicuously good results in Indianapolis and some other cities, and with less satisfactory results in Chicago. Highly beneficial consequences have also come from the new practice of allowing court fines to be paid in instalments.² Finally, to supply the lack of suitable institutions for the detention of certain classes of offenders, farm colonies have been established by Los Angeles, Duluth, and other cities. Cleveland, for example, has a correctional farm for vagrants and a farm colony for boys and another for girls. "The purpose of these farms is to furnish a refuge where offenders may work out their own salvation, living in the open air and paying their own way."³

Punish-
ments

Scarcely second in importance to the work of the police department is that of the fire department. Indeed the functions of the two touch at several points, inasmuch as the police are frequently required to make the inspections which are necessary to the complete enforcement of many regulations laid down by the fire department. Not illogically, therefore, these two branches of municipal

Fire de-
partment

¹ M. N. Goodnow, "A New Public Servant—The Municipal Psychopathologist and His Task of Soul-Saving," *Nat. Mun. Rev.*, VIII., 306-311 (June, 1919).

² L. and E. Stern, *A Friend at Court* (New York, 1923); J. A. Collins, "Probation—a Practical Help to the Delinquent," *Nat. Mun. Rev.*, IV, 217-223 (Apr., 1915); "Suggested Tests for Probation Officers," *Public Personnel Studies*, IV, 185-200 (June, 1926).

³ Los Angeles, Portland (Ore.), and some other cities have appointed officials, called public defenders, who, at public expense, conduct the cases of accused persons who are too poor to employ legal counsel. See M. C. Goldman, *The Public Defender; a Necessary Factor in the Administration of Justice* (New York, 1917); W. J. Wood, "The Public Defender," *Rev. of Revs.*, LXI, 303-307 (Mar., 1920); for further references, see p. 876, note 1.

service are often brought together in a single administrative department presided over by a commissioner of public safety. In about two-thirds of the cities having a population of more than thirty thousand in 1917 the control of the fire department was vested in a single commissioner (whether or not combined with police administration), and for much the same reason that a single head is preferred to a board in the case of the police department. In the other third the department was in charge of a board or of a committee of the city council.¹ Two or three decades ago, paid professional fire departments were to be found in only the largest cities; elsewhere, the work of fire-fighting was carried on by volunteer unpaid companies consisting of men who were employed most of the time in other pursuits. Now all this is changed; the city, be it small or large, which is without its professional, paid fire department is regarded as decidedly backward. In 219 cities of thirty thousand population in 1917 only 162 volunteer fire companies were reported by the census authorities, in comparison with 3,790 paid companies. Fire departments are regularly organized in small units or companies, which are stationed at different points throughout a city. In large cities the companies in a district of considerable size are organized into battalions. In any case, at the head of the active fire-fighting force is the fire chief or fire marshal, who may or may not be the administrative head of the department.²

Functions:

1. Fire-
fighting

One naturally thinks of the fire department primarily in connection with its most conspicuous activity, namely, fire-fighting. In this line of work, the equipment, methods, and achievements of American fire departments far surpass those of any European city. Nevertheless the annual fire loss in European cities is far less than in American cities. The reason is, chiefly, that in Europe greater stress has been laid upon measures designed to prevent the outbreak and spread of disastrous conflagrations than in the United States. There is, consequently, less need to spend large amounts of energy and money on the development of fire-fighting agencies. American cities, however, in the past few years, have been waking up to the truth of the old adage that an ounce of prevention is worth more

2. Fire
prevention

¹ U. S. Census Bureau, *Statistics of Fire Departments in Cities*, etc. (1917).

² R. Adamson, "Fire Administration" [in New York City], *Acad. Polit. Sci. Proceedings*, V, 66-85 (Apr., 1915); M. C. Deshel, "Safeguarding Life and Property," *Outlook*, CXXIII, 298-301 (Nov. 12, 1919); N. Fuessle, "The New Fire Fighters," *ibid.*, CXXIX, 174-176 (Oct. 5, 1921); G. W. Booth, "Standards of Adequate Fire Protection," *Nat. Mun. Rev.*, XVI, 223-226, (Apr., 1927).

than a pound of cure. Twenty or more cities now have separate bureaus of fire-prevention, organized within the fire department. Stricter building codes, supplemented by adequate inspection of buildings during construction, and by frequent surveys of conditions adjacent to buildings with a view to the discovery and removal of accumulations of rubbish and avoidance of careless and improper storage of explosives, are contributing in no small measure to the gradual reduction of our appalling fire losses. To render these forms of fire-prevention activity more effective, the fire department should be given some measure of police power, so that the department itself, without depending on the police force, can carry out regulations designed to safeguard life and property.

Popular interest in fire prevention is being stimulated. Prior to 1921, about half the states observed a "fire-prevention day," often combined with a "clean-up day." In that year, President Harding inaugurated a nation-wide "fire prevention week," selecting the week in which falls the anniversary of the great Chicago fire, October 9, 1871. On these occasions, and at other times as well, special and varied efforts are made to bring home to the public the magnitude of our annual fire loss as a nation and the precautionary measures that should be observed by all of us.¹ In Seattle, for example, lectures by carefully selected members of the fire department have been given to large numbers of school children; and in Yonkers, New York, a similar end is attained by the organization of the school children into fire-prevention leagues. Every progressive fire department also disseminates information, either through the newspapers or in special circulars, concerning ways of reducing fire hazards. As a result of these varied efforts, the public is gradually coming to realize that fire prevention is entitled to rank in importance with preventive medicine in promoting the public safety and welfare.²

With these increasingly varied duties to perform, the members of the fire department obviously ought not to receive their appointment to a place on the city's payroll as a result of personal or political favoritism, but only after satisfactorily passing a competi-

CHAP.
XLVIII

Selection
and train-
ing of
firemen

¹P. Bugbee, "Getting Ready for a Local Observance of Fire-Prevention Week," *Amer. City*, XXIX, 276-282 (Sept., 1923).

²A highly important, though little known, private institution devoted to testing both fire-prevention and fire-fighting inventions and appliances is the underwriters' laboratories maintained in Chicago and a few other cities by the National Board of Fire Underwriters. See H. C. Brearley, *History of the National Board of Fire Underwriters* (New York, 1916), Chaps. xiv-xvi, and *A Symbol of Safety* (Garden City, N. Y., 1923).

tive examination similar to that now usually required of candidates for police appointments.¹ Furthermore, after their appointment new recruits should undergo a probationary period of instruction in the duties which they will be called upon to perform. Appreciating the importance of this training, New York, Chicago, and Pittsburgh have opened schools for firemen, where instruction is given in modern fire-fighting, including ladder and hose drills, rescue work, pulmotor applications, and the use of fire towers.

Health and
sanitary
department

Few, if any, municipal functions are of more importance than the work of the health and sanitary department.² Yet the amount of city money set aside for that department is nearly everywhere less than the amount granted for police and fire protection or for education.³ Few departments are brought into close contact with so many other branches of the city government as is the department charged with protecting the public health. It is brought into relation with the bureau in control of water supply and purification, with the department or bureau in charge of garbage collection and disposal, with the sewerage and street cleaning departments, with the police department in the enforcement of the sanitary code, and with the educational authorities, especially in the matter of medical and dental inspection of school children. Harmonious coöperation with all of these various bureaus and departments is, therefore, indispensable to the proper functioning of the health department, a condition which, unfortunately, by no means always exists.

Organiza-
tion

In commission-governed cities, health protection is usually combined with police and fire administration in the department of public safety; but elsewhere, especially in the larger places, there is a separate department of health, at the head of which a board or commission is more frequently found than in the case of the police and fire departments. In New York City, for example, health administration is in the hands of a composite board composed of

¹ *Public Personnel Studies*, II, 226-234 (Oct., 1924), "Suggested Tests for Fire Fighters;" W. C. Beyer, "The Hire of Firemen and Policemen," *Annals Amer. Acad. Polit. and Soc. Sci.*, CXIII, 235-246 (May, 1924).

² In some cities sanitary work, which partakes largely of engineering, has been assigned to a separate sanitary department or to the street department.

³ New York City in recent years has been exceptionally generous in the support of public health activities. In 1924, for example, over fourteen per cent of the total budget went for health conservation. This was nearly half the amount appropriated for education and recreation, slightly in excess of the appropriation for police protection, and more than double the sum set aside for fire protection.

the health commissioner,¹ who is the department's responsible head, the police commissioner, and the health officer of the port, the latter a state official. In Chicago and many other cities, on the other hand, the health department is presided over by a single commissioner, appointed by either the mayor or the city council. Many places, especially small or medium-sized cities and villages, do not employ full-time health officers, and such public health activities as are carried on are looked after by a physician who devotes most of his time to his private practice. Under these conditions, a real health department is, of course, practically non-existent, and public health activities are apt to be of a very restricted sort.² Occasionally two or three small cities lying close together, *e.g.*, La Salle, Peru, and Oglesby, Illinois, have combined to employ a full-time health officer and develop a joint health administration, to the great advantage of each community concerned. Such a policy ought to commend itself, not only to neighboring small cities, but to towns and villages as well.

Probably no health department is better organized, carries on a wider range of activities, and is more efficiently administered, than that of New York City. Here the board of health enacts the sanitary code of the city, issues emergency health orders, and has very broad powers in all matters affecting the public health; on extraordinary occasions, it may even destroy property, imprison persons, and forbid traffic and intercourse in order to check the spread of disease. Under the general supervision of the board of health, and under the direct control of the commissioner of health, are the following nine bureaus:

(1) The bureau of administration, which coördinates and supervises the activities of the other bureaus and serves as the medium of communication with other departments of the city government; (2) the bureau of records, which collects, preserves, and publishes vital statistics, issues burial permits, registers all practising physicians, assists in the enforcement of child-labor and compulsory-school-attendance laws, and conducts all other statistical work of the department; (3) the sanitary bureau, which has general jurisdiction over sanitary conditions, investigates reported nuisances, controls slaughter-houses and livery stables, and makes a detailed

¹ The commissioner is appointed by the mayor. See C. E. McCombs, "Public Health and Private Investigations," *Nat. Mun. Rev.*, VII, 387-394 (July, 1918).

² M. N. Baker, "The Municipal Health Problem," *Nat. Mun. Rev.*, II, 200-209 (Apr., 1913).

sanitary survey of the entire city; (4) the bureau of preventable diseases, which is responsible for the registration, sanitary supervision, and necessary care of all cases of communicable diseases, the maintenance of the ambulance service, the disinfecting of premises and goods, the holding of tuberculosis and other clinics, and the organization and distribution of a large staff of field nurses; (5) the bureau of child hygiene, which has general supervision and care of the health of infants and children (including medical inspection and physical examination of all school children), holds eye and dental clinics in the schools, and supervises infant milk stations, day nurseries, and all institutions caring for dependent children; (6) the bureau of food and drugs, which investigates and controls the food and drug supply of the city, and conducts not only the inspection of foodstuffs but also the sanitary inspection of the premises where foods are stored, handled, prepared, or sold, and inquires into the physical condition of persons who prepare or serve food in hotels, restaurants, and other public eating-places;¹ (7) the bureau of laboratories, which carries on varied forms of research work, maintains supply stations at drug stores throughout the city where physicians may obtain diphtheria antitoxin and vaccine, and makes scientific studies of such diseases as tuberculosis, diphtheria, cholera, and typhoid fever, and devises modes of combatting them; (8) the bureau of hospitals, which supervises the five hospitals maintained by the department for the care of persons afflicted with communicable diseases; and (9) the bureau of public health education—one of the most recent and important divisions of the department—which has charge of the dissemination of information concerning the health of the community, the securing of better coöperation between the department officials and the public, the publication of health literature, including weekly and monthly bulletins for the information of physicians, the giving of health lectures to city employees and the public, the organizing of exhibitions and moving-picture shows, and not a few other activities.²

¹ N. M. Reed, "Protecting the Food of the City," *Outlook*, CXXIV, 114-117 (Jan. 21, 1920); W. W. Rogers, "Guarding the Health of the People," *ibid.*, CXXIV, 424-427 (Mar. 10, 1920); "Need of Municipal Meat Inspection," *Nat. Mun. Rev.*, IX, 189 (Mar., 1920); E. Weil, "Guarding New York's Food is a Huge Task," *N. Y. Times*, Aug. 1, 1926; J. W. Harrington, "New York Milk Inspection is a Huge Task," *ibid.*, Oct. 31, 1926; W. Sammis, "Vast River of Milk Flows Daily to City," *ibid.*, Oct. 9, 1927.

² *Municipal Year-Book of the City of New York* (1916), 208-209. To the health department in Chicago the abatement of smoke and noise nuisances has recently been assigned. On the smoke nuisance, see *Nat. Mun. Rev.*, V, 299-

This summary will serve to give some idea of the great variety of functions that may fall to the lot of a health department in any large city. Many of the activities noted are not carried on at all in some cities, either by the health department or any other branch; on the other hand, the health department is sometimes made responsible for the cleaning of streets and alleys, for tenement house inspection, and for other activities which in New York are assigned elsewhere. The summary also brings out forcibly the fact that whereas formerly the work of the health department consisted almost wholly in discovering and abating nuisances and in fighting epidemics that might have been prevented, effort nowadays runs chiefly along the lines of preventive medical or sanitary science. "Health departments, properly equipped and based on correct principles . . . are veritable armies waging war on the causes of disease, no matter how subtle or remote they may be, no matter whether lurking in the home, the school, or the workshop."

CHAP.
XLVIII
Emphasis
on pre-
ventive
measures

REFERENCES

- L. D. Upson, *The Practice of Municipal Administration* (New York, 1926), Chaps. XIV-XV, XIX.
W. B. Munro, *Municipal Government and Administration* (New York, 1923), II, Chaps. xxx-xxxv.
W. Anderson, *American City Government* (New York, 1925), Chaps. xvi-xix, xxiii-xxiv.
H. G. James, *Municipal Functions* (New York, 1917), Chaps. II, III, v.
F. J. Goodnow and F. G. Bates, *Municipal Government* (New York, 1919), Chap. xi.
C. A. Beard, *American City Government* (New York, 1912), Chaps. vi, x, xi.
C. Zueblin, *American Municipal Progress* (rev. ed., New York, 1916), Chaps. v, vii, viii, ix.
A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), II, 18-20, 117-121, 700-705.
W. McAdoo, *Guarding a Great City* (New York, 1906).
A. Woods, *Policeman and Public* (New Haven, 1919).
R. B. Fosdick, *American Police Systems* (New York, 1920).
E. D. Graper, *American Police Administration* (New York, 1921).
Cleveland Foundation, *Criminal Justice in Cleveland* (Cleveland, 1921).
E. F. Croker, *Fire Prevention* (New York, 1913).
H. B. Hemenway, *American Public Health Protection* (Indianapolis, 1916), Chaps. vii-ix.
303 (Apr., 1916); *ibid.*, XII, 111-113 (Mar., 1923); *ibid.*, XV, 270-276 (May, 1926). On the noise nuisance, see *ibid.*, IV, 231-237 (Apr., 1915); *ibid.*, VIII, 557-561 (Oct., 1919); *ibid.*, XI, 326-332 (Oct., 1922).

950 INTRODUCTION TO AMERICAN GOVERNMENT

CHAP.
XLVIII

H. W. Hill, *The New Public Health* (New York, 1918).

M. P. Horwood, *Public Health Surveys* (New York, 1921).

W. T. Howard, *Public Health Administration . . . in Baltimore, Md.* (Washington, 1924), Chaps. IV-VII.

J. Robertson, *Housing and the Public Health* (New York, 1920).

C. E. McCombs, *City Health Administration* (New York, 1927).

CHAPTER XLIX

OTHER MUNICIPAL ACTIVITIES—CITY FINANCE

The preceding chapter sketched the principal city activities which spring from the primary function of all government, the protection of life and property. Many activities of the modern city, however, have little or nothing to do with the citizen's protection and involve the exercise of powers which are neither necessary nor peculiar to government as such. They are, rather, engineering, commercial, or social enterprises—undertakings such as might be, indeed often have been, carried on by private persons or corporations. To some of them, and to the subject of municipal finance, the present chapter will be devoted.

A city's engineering activities are commonly grouped in a single department of public works, although in many instances they are distributed among several departments. At the head of the department of public works one rarely finds a board or a commission, as in the case of health and education departments, but almost invariably a single commissioner, who is often a person with some engineering experience, although this is not absolutely essential if his subordinates include properly trained engineers and other technical experts. But under any circumstances the headship of the department of public works in a city of considerable size calls for a man of large administrative ability and business experience.¹

Public
works:

The most common forms of municipal public works in this country have to do with the water supply, the city's wastes, and the city's streets. First in importance comes the provision of an adequate water supply for domestic and industrial purposes. The storing and distribution of water is primarily an engineering enterprise, but one which in the great majority of cities has been made a municipal, rather than a private, business because of the intimate relation which the water supply bears to the health of the community and to the efficiency of its fire department. It is also one

1. Water
supply

¹ Cf. C. A. Howland, "Municipal Expenditures for Public Works," *Nat. Mun. Rev.*, XVI, 580-586 (Sept., 1927).

of the most remunerative of the city's enterprises and is therefore often made to contribute to the support of other activities of the city government. Sometimes an adequate supply can be obtained only, or at all events most satisfactorily, at a distance of a hundred miles or more, entailing the construction of elaborate and costly engineering works, as in the case of New York,¹ San Francisco, and Los Angeles. Even so, the service can usually be made to pay for itself in a reasonable time, and thenceforth to yield a net revenue.

In many places the water supply, in its natural condition, is so turbid or muddy, or so impure, or both, as to require special treatment before being used for domestic purposes. To eliminate turbidity, water is often stored in huge reservoirs or tanks where sedimentation is hastened by the introduction of quantities of alum. To sterilize water and thus destroy most of the harmful bacteria in it, liquid chlorine gas is in common use, being injected frequently and in carefully measured quantities. To remove, not merely to kill, noxious bacteria, filtration plants have been introduced rapidly in many of our larger cities. The removal in this way of practically all disease-breeding bacteria has usually been reflected almost immediately in a lowered death-rate from typhoid fever. Two kinds of filters are in common use, the slow sand-filter and the rapid sand-filter; both are based on the same principle, namely, the removal of impurities by forcing the water slowly, and at a carefully regulated rate, through several successive layers of gravel and sand.² The largest slow sand-filters are at Albany, Philadelphia, Pittsburgh, and Washington. The Philadelphia filters constitute the largest plant of the kind in the world, and have a capacity of four hundred million gallons daily. Rapid sand-filters are better suited to the needs of cities whose water is turbid at certain seasons of the year, and are therefore more commonly found in the Middle West, the largest being at Cincinnati and Columbus, Ohio.

The collection and disposal of wastes is everywhere an impor-

¹ On the New York-Catskill system, see J. L. Stockton, "The City's Water Supply," *Outlook*, CXXIII, 182-188 (Oct. 1, 1919); A. Meland, "New York's Great Water Project is Finished," *N. Y. Times*, July 11, 1926; W. W. Brush, "Has the Catskill Water Supply System . . . Fulfilled Expectations?" *Nat. Mun. Rev.*, XVI, 159-163 (Mar., 1927).

² M. F. Stein, "How Filtration Plants Work," *American City*, XIII, 233-237 (Sept., 1915); G. A. Johnson, *Purification of Public Water Systems* (Washington, 1913); A. Hazen, *Clean Water and How to Get It* (2nd ed., New York, 1914); J. W. Ellms, *Water Purification* (New York, 1917); W. Garnett, *Water Supply* (New York, 1922).

tant municipal activity, although far more is undertaken in this matter in some cities than in others. Few people appreciate the fact that, counting all kinds, a city's wastes exceed a ton a day per capita. In every city of some importance the problem of their collection and disposal is, therefore, one of serious magnitude.¹

There are five principal forms of municipal waste, namely, ashes, inorganic rubbish, street sweepings, garbage, and sewage. The collection and disposal of the first three present no serious difficulties and are often left to private individuals or concerns. Garbage and sewage, on the other hand, offer problems of much seriousness and importance. Garbage consists chiefly of the kitchen wastes from hotels, restaurants, and private dwellings, and hence materials in which putrefaction early sets in and which soon become offensive, if not actually dangerous to health.² Garbage collection is in some cities wholly a municipal undertaking; in others it is left to private parties; while in still other cases a combination of the two methods is found. Similarly, the waste is disposed of in a variety of ways. Some cities, *e.g.*, Denver and Omaha, own hog-farms or piggeries on which the animals are fed the city garbage. Others, as Milwaukee, Minneapolis, and Memphis, have incineration plants where garbage is burned, either along with rubbish or separately. In recent years garbage reduction plants have come into favor in Chicago and elsewhere, the oils and fats being extracted for commercial use in the form of soaps and axle-grease, leaving a residue which is salable as a fertilizer.³

Sewage consists primarily of water-borne human effluvia from dwellings and wastes from many industrial plants such as laundries and slaughter-houses. More than other forms of waste, this bears the germs of disease, and its proper collection and disposal

CHAP.
XLIX

2. Waste
collection
and
disposal

Garbage

Sewage

¹G. C. Whipple, "The Broadening Science of Sanitation," *Atlantic Monthly*, CXIII, 630-641 (May, 1914).

²See M. N. Baker, "Garbage and Refuse Disposal a Matter of Cleansing Rather Than Health," *Nat. Mun. Rev.*, XIII, 675-678 (Dec., 1924).

³For recent developments connected with waste or refuse collection and disposal, see Brooklyn Chamber of Commerce, *Collection and Disposal of Municipal Waste in New York City* (Pamphlet, 1919); J. C. Young, "City Faces a Crisis over Disposal of Waste," *N. Y. Times*, Mar. 13, 1927; *Outlook*, CXXIV, 67-71 (Jan. 14, 1920); St. Louis, *Amer. City*, XXIX, 265-267 (Sept., 1923); *Nat. Mun. Rev.*, XIV, 48 (Jan., 1925); New Orleans, *Nat. Mun. Rev.*, XII, 39-40 (Jan., 1923); Buffalo, *ibid.*, XII, 733-734 (Dec., 1923); Seattle, *ibid.*, XII, 152 (Mar., 1923); Indianapolis, *ibid.*, VIII, 391 (July, 1919); *ibid.*, XIII, 657 (Nov., 1924); Paterson, N. J., *ibid.*, XII, 208-209 (Apr., 1923); Boston, *ibid.*, XII, 393-394 (July, 1923); Washington, *ibid.*, XIII, 583-584 (Oct., 1924).

become of prime concern to the health of the community. One of the earliest and most important of municipal engineering activities is, therefore, the installation, operation, and maintenance of an adequate sewerage system, consisting of trunk lines, lateral branches, and connections for each building used as a dwelling or for commercial or industrial purposes. In many cities the problem is not solved with the construction of the sewerage system, the chief purpose of which is to collect sewage and carry it off; there remains the question of final disposal. In cities on the ocean or large lakes or rivers, this problem of disposal may find ready solution. But where the same lake or river serves as the source of water supply for other communities, different methods of disposal have to be found, or the sewage must be subjected to special treatment before it is turned into the lake or stream in question. Following the example of some European cities, Pasadena and Salt Lake City have large sewage farms upon which the sewage is allowed to flow, serving the purpose of irrigation in the cultivation of fruit and vegetables. Other cities, *e.g.*, Worcester and Providence, use large sedimentation basins or tanks for the separation of the solid matter from the water before the latter is turned into a water-course. Still other methods of sewage treatment which have been introduced rapidly in the past few years are the intermittent sand-filtration process, the percolating or sprinkling-filter system, contact beds, and especially the activated sludge process, which is now being extensively used in Milwaukee, Chicago, and other cities.¹

3. Streets

Within the jurisdiction of the department of public works, when not assigned to a separate department of streets, as is sometimes the case in large cities, falls the work of planning the width and direction of city streets, making the necessary surveys, curbing, paving, cleaning, repairing, sprinkling, and lighting the streets, and laying sidewalks. Enormous progress has been made during the past few years in street paving and cleaning² and lighting.

¹ See W. B. Fuller, "Sewage Disposal by the Activated Sludge Process," *Amer. City*, XIV, 78-81 (Jan., 1916). On the activated sludge process in Milwaukee, see *ibid.*, XVIII, 1-4, 114-119, 199-203 (Jan.-Mar., 1918); in Chicago, *Nat. Mun. Rev.*, XIII, 239-240 (Apr., 1924); Trustees of the Sanitary District of Chicago, *Memorandum Concerning the Drainage and Sewerage Conditions in Chicago* . . . (Chicago, 1923), 15-23; W. A. Bassett, "Chicago's Sewage Disposal Dilemma," *Nat. Mun. Rev.*, XIV, 266-267 (Apr., 1925).

² See C. Aronovici, "Municipal Street Cleaning and Its Problems," *Nat. Mun. Rev.*, I, 218-225 (Apr., 1912); "The Snow Removal Problem in American Cities," *Amer. City*, XXIX, 347-353, 479-482 (Oct.-Nov., 1923). On traffic problems, see M. McClintock, *Street Traffic Control* (New York, 1925); *Annals Amer. Acad. Polit. and Soc. Sci.*, CXXXIII, 1-249 (Sept., 1927), series of

One seldom comes across a city nowadays, no matter how small, in which at least the principal streets are not paved, and in which all are not lighted by either gas or electricity. Brick and wooden blocks for retail business and residential streets have practically displaced the macadam of a former generation; in the residential and boulevard sections miles of concrete or asphalt roadway are to be found in every city of considerable size; while in the heavy traffic sections granite blocks are often employed. In the majority of cities street lighting is not carried on directly by the municipality, but is done by private corporations under contract. Nevertheless there has been a noteworthy increase in the number of cities owning and operating their electric lighting plants for street and commercial purposes, although the same cannot be said with respect to gas-works.

CHAP.
XLIX

Other activities included in the term public works are the erection and maintenance of the city hall and other buildings owned by the city, the construction and care of bridges, and in some places the care and upkeep of parks, playgrounds, and cemeteries and the operation of municipal markets and transportation systems. In carrying on the varied enterprises mentioned every city is called upon to decide whether it will lay the sewers, pave, repair, and clean the streets, and erect public buildings with its own labor force and materials, or whether it will let out the work on contract to be done by private parties under carefully specified conditions. Each system has its advantages and its disadvantages; and experience shows that in some kinds of work the direct plan is quite satisfactory, while in others the contract system yields better results.¹ In many cities both systems are in use. The construction of the great majority of public works is, however, done under the contract form. It is not difficult to see why "machine" politicians are especially eager to obtain control of the department of public works. By so doing they can secure lucrative contracts for their friends and well-paying employment for their humbler political followers. Philadelphia, for example, has long suffered

Direct or
contract
work

articles on "Planning for Street Traffic;" L. D. Upson, *Practice of Municipal Administration*, Chap. XX; H. S. Buttenheim, "Have Our Cities Fallen Down on Their Traffic Job?" *Nat. Mun. Rev.*, XVI, 755-761 (Dec., 1927); G. G. Hulse, "Chicago's Disposition of Street Traffic Violations," *ibid.*, XVI, 498-502 (Aug., 1927).

¹The two methods are compared in W. B. Munro, *Municipal Government and Administration*, II, Chap. xxv; *Nat. Mun. Rev.*, XIII, 241-243 (Apr., 1924).

from the pernicious influence of city contractors in municipal politics.¹

Municipal functions which, for want of a better classification, may be lumped together as social-welfare activities, have increased astonishingly both in number and variety during the past fifteen years. Practically every city, however small, carries on at least two or three such activities, and in our larger cities the number is almost legion. A score or two of cities have, since 1908, formally recognized the importance of this branch of municipal activity by creating, under one name or another, departments or bureaus of social welfare. Among such cities are Dayton, Chicago, Kansas City, Los Angeles, Indianapolis, St. Louis, Minneapolis, Springfield (Mass.), and Philadelphia. These departments or bureaus of social welfare have taken over many phases of philanthropic or charitable work previously performed by private individuals or unofficial organizations. The municipalization of such activities has grown out of the increasing realization that society at large should regard the defective, delinquent, and otherwise handicapped classes in the city as, in a sense, the wards of the community, and should therefore provide, through governmental machinery, ways and means of promoting their physical, moral, and economic welfare. The development is based on the belief that it is just as much the duty of a city to concern itself with the special problems of human life, of community efficiency and betterment, as to concern itself with questions of police and fire and health protection, garbage and sewage disposal, and education.²

Scope

The multifold character of welfare work—which may or may not be carried on under a formally organized welfare department—may be seen from the following list of more or less common welfare activities and agencies: the establishment of free employment

¹See J. W. Follin, "Municipal Street Cleaning Wins in Philadelphia," *Nat. Mun. Rev.*, X, 272-273 (May, 1921); Philadelphia Bureau of Municipal Research, *Municipal Street Cleaning in Philadelphia* (pamphlet, 1924), summarized in *Nat. Mun. Rev.*, XIII, 653-654 (Nov., 1924).

²See M. K. Simkhovitch, "The City's Care of the Needy: a Program for a Department of Charities," *Nat. Mun. Rev.*, VI, 255-262 (Mar., 1917); A. T. Burns, "Private and Public Welfare Activities," *ibid.*, VI, 263-268 (Mar., 1917); H. C. Carbaugh, *Human Welfare Activities in Chicago* (Chicago, 1917); B. Schwartz, "Baltimore Adopts New Conception of Public Welfare," *Nat. Mun. Rev.*, XII, 7-8 (Jan., 1923); C. E. McCombs, "Charleston Breaks with the Past in Welfare Work," *Nat. Mun. Rev.*, XIII, 341-349 (June, 1924); R. W. Kelso, "Public Welfare! Whose Responsibility?" *ibid.*, XIV, 233-239 (Apr., 1925); E. S. Brownlow, "Coördination of Social Work in Knoxville," *ibid.*, XIV, 300-306 (May, 1925); L. E. Bowman, "Public and Private Provision for Social Service in New York City," *ibid.*, XIV, 483-490 (Aug., 1925).

bureaus; the relief of poverty and other forms of individual and family distress; investigation and prosecution of "loan sharks" who prey upon the poor;¹ granting mothers' pensions;² giving legal aid to those who are too poor to employ a lawyer; maintaining infant milk stations, day nurseries, and child-welfare stations;³ employing a staff of visiting nurses to give instruction and care in maternity cases; instructing the children of the poor, and, through them, their parents, how to improve the home and reduce the cost of living; establishing municipal lodging-houses and municipal tenements; providing properly chaperoned dance-halls and other forms of indoor entertainment;⁴ conducting manual training, vocational, and "Americanization" classes; creating insurance and loan-savings institutions; interesting children in gardening; providing free public baths and public laundries; organizing folk dances and neighborhood and community pageants;⁵ and conducting investigations and researches into important sociological problems such as the causes, extent, and remedies for poverty, disease, and juvenile delinquency. The establishment and maintenance of parks and playgrounds have long been recognized as legitimate municipal activities in all our larger cities; but the number of small parks and playgrounds and neighborhood centers, with their varied opportunities for both indoor and outdoor recreation, have been greatly multiplied in recent years in cities of all sizes. With this development has also come the systematic supervision of games of all sorts and of field athletic sports by competent playground leaders.⁶ Long as the list may seem, it by no means includes all of the welfare activities now carried on in American cities; nor does it include numerous other

¹ Chicago Department of Public Welfare, *Bulletin* I, No. 4 (1916), "The Loan Shark in Chicago."

² L. Jones, "City Mothers' Bureau of Los Angeles," *Nat. Mun. Rev.*, IX, 484-488 (Aug., 1920).

³ A. L. Strong, "Child Welfare Exhibits," *Nat. Mun. Rev.*, I, 248-252 (Apr., 1912).

⁴ F. Rex, "Municipal Dance Halls," *Nat. Mun. Rev.*, IV, 413-419 (July, 1915).

⁵ M. G. Tierney, "The St. Louis Municipal Outdoor Theater," *Nat. Mun. Rev.*, XI, 128-130 (May, 1922).

⁶ G. A. Bellamy, "New Visions in Public Recreation," *Nat. Mun. Rev.*, VIII, 229-234 (May, 1919); G. Fox, "Recreation—A Part of the City's Job," *Nat. Mun. Rev.*, X, 423-427 (Aug., 1921); W. T. Wood, "Crime Prevention Through Recreation," *ibid.*, XIII, 191-194 (Apr., 1924); F. R. McNinch, "Twelve Month Recreation," *ibid.*, XIII, 261-263 (May, 1924); E. E. Smith, "Public Provision for Recreation" [in New York City], *Outlook*, CXXIII, 508-510 (Dec. 17, 1919); W. Pangburn, "Municipal Sports in the United States," *Nat. Mun. Rev.*, XIV, 651-658 (Nov., 1925); *ibid.*, "Tendencies in Public Recreation," *ibid.*, XV, 514-518 (Sept., 1926).

important municipal activities carried on by European cities, whence, indeed, has come much of the inspiration for this sort of work in the United States.

Education

Educational activities are among the oldest of municipal functions in the United States. Like towns and villages, cities are given large freedom in organizing their public school system and in raising money for its support; and few activities have been more generously upheld. As a rule, school affairs are not directly under the control of either the council or the administrative departments, but are placed under the more or less separate and independent jurisdiction of a school board or committee, or a board of education. Exceptions to this practice are to be found chiefly in some of the commission-governed cities. Formerly, school boards of over forty members were in existence.¹ But the recent tendency has been in the direction of smaller boards, and they now range from three members in Albany to eleven in Chicago and Detroit, twelve in St. Louis, fifteen in Pittsburgh and Philadelphia, and seventeen in Providence. Members are chosen in a variety of ways, the two most common being popular election, as in Boston and Cleveland, and appointment by the mayor, as in New York and Chicago. In other cities, especially in the South, the board is appointed either by the city council or by the courts.² Terms of office vary from one year in some of the smaller cities to six and seven years in St. Louis and San Francisco, respectively; two years is perhaps the most common period. The tendency is to lengthen the term and to reëlect members who are willing to serve a second or third term. In the great majority of cities the members serve without pay, although in San Francisco and Rochester they receive compensation.

School
boards

Duties

Upon these school boards is placed the responsibility for the administration of the entire public school system. They attend to the selection and purchase of land and buildings for school pur-

¹ In New York, for example, the board of education until recently consisted of forty-six members, appointed by the mayor for a five-year term. At present the board consists of seven members, serving without pay. For reductions in other cities, see W. B. Munro, *Municipal Government and Administration*, II, 332 n.; B. M. Watson, "Tendencies in City School Board Organization," *Nat. Mun. Rev.*, VII, 58-61 (Jan., 1918).

² In San Francisco, a charter amendment, adopted in November, 1920, enlarged the school board from four to seven members serving seven-year terms; and provided a new method of selection. The mayor nominates members for the board at least sixty days before the regular city election, and at the election the voters approve or reject his nominations. In case of rejection the mayor makes a new temporary appointment until the next election.

poses, and pass upon plans and specifications and let contracts for the construction of buildings; they provide the necessary fuel and other supplies and janitor services; they are the custodians of all school property; they determine many points connected with the educational policy of the city; they estimate the sums needed for educational purposes each year and either ask the city council for the amount or, if their authority permits, make a direct tax levy; finally they appoint the school superintendent and have more or less to say in the appointment, promotion, and transfer of teachers. The superintendent is the responsible expert executive directly in charge of the educational activities of the schools. He, therefore, holds a position in relation to the school board very closely analogous to that held by the city manager under the commission in cities having managerial government.¹

The past ten or twenty years have witnessed a remarkable expansion in the educational and allied activities of American cities. These now include medical, dental, and psychopathic examination of school children; special classes for children found to be mentally or physically defective; evening classes for immigrants and illiterates;² vocational guidance, including manual training, domestic science, and commercial courses; the operation of low-priced or free lunchrooms for school children;³ and numerous other activities. Many persons now in early middle life can remember when few, if any, schoolhouses were ever used outside of school hours; indeed few schoolhouses were lighted in any way for use after dark, and their use for political purposes was simply unthinkable, while within the sacred precincts of the school yard no one was permitted to loiter after the close of school in the afternoon. Now all this has been changed in a hundred or more cities; schoolhouses are lighted with gas or electricity and thus are made available for evening lectures and entertainments and as centers of neighborhood sociability;⁴ the school yard has been

Expansion
of educa-
tional
activities

¹ W. McAndrew, "Why and How the Public Manages Schools," *Outlook*, CXXIV, 651-655, 707-713 (Apr. 14, 21, 1920). These articles describe the system in New York City.

² G. Mason, "An Americanization Factory," *Outlook*, CXII, 439-448 (Feb., 23, 1916)—on Americanization work in the public schools of Rochester, N. Y. See also O. Noyem, "Adult Education in New York City," *Nat. Mun. Rev.*, II, 671-674 (Oct., 1913).

³ "The School Lunch in Rural and Urban Districts," *Amer. City*, XXVII, 43-47 (July, 1922); J. C. Gebhart, "Municipal School Feeding," *Nat. Mun. Rev.*, VIII, 159-163 (Mar., 1919).

⁴ C. A. Perry, *The Extension of Public Education: A Study in the Wider Use of School Buildings* (New York, 1911).

enlarged and transformed into a general public playground equipped with special apparatus, to which the children of the neighborhood are not only permitted, but urged, to resort at any time outside of school hours. Moreover, hundreds of schoolhouses throughout the country are now used as polling-places on election day,¹ and even some of the so-called conservative New England states permit public meetings, including political gatherings during electoral campaigns, to be held in them.

To carry on these manifold activities, and to meet the steadily increasing demands which are being made upon all of our city governments, the collection and expenditure of immense sums of money are required.² New York City's budget for 1927 amounted to almost \$450,000,000, a sum nearly equal to the combined amounts spent by the New England, Middle Atlantic, and South Atlantic states for the operation and maintenance of the general departments of their state governments.³ Partly because of these increasing demands upon the city's exchequer, and because the cost of living for governments as well as for individuals has enormously increased during the past few years, many cities are now finding it extremely difficult to raise the necessary funds to carry on present activities—to say nothing of taking on new functions—without resorting to burdensome taxation. This is especially true of some of the largest cities, which hitherto derived a very considerable share of their revenue from liquor licenses—a source which suddenly dried up after the enactment of the eighteenth amendment to the national constitution.

The principal sources of municipal revenue are: (1) direct taxes on real and personal property, which now furnish by far the largest part of the revenue of every American city, the rate of the tax being fixed by the city council or commission and limited in many states by constitutional or statutory provisions; (2) taxes derived from public service corporations, such as street railways, gas and electric lighting companies, and telephone companies, and assessed upon the company's real estate, on its capital stock, on its mileage, or on its net or gross earnings; (3) poll taxes in a few cities, including Boston and Philadelphia, the returns

¹ L. H. Pink, "Polling Places in the Schools," *Nat. Mun. Rev.*, II, 451-455 (July, 1913); "Democratizing the Schoolhouse," *ibid.*, VIII, 594 (Nov., 1919). In New York City, 519 school buildings were used as polling places in 1923.

² On the growth of city activities in Detroit and the consequent increase in governmental costs, see *Nat. Mun. Rev.*, XI, 317-320 (Oct., 1922).

³ It has been computed that in 1923 New York City spent every day for governmental purposes the equivalent of a ton and a half of gold.

from which are comparatively small; (4) license fees exacted from a multitude of different enterprises and pursuits, including theaters, motor vehicles,¹ street vendors, and plumbers;² (5) state grants or subventions for special purposes, such as education and sometimes highway improvement; (6) income from municipal enterprises, especially from water-rates and the sale of electricity to private consumers, and from a few municipally-owned street railways—sources which are vastly more productive in European than in American cities; (7) endowment or trust funds provided by private benefaction, the income being usable for certain specified activities, especially along social-welfare lines, notable instances being found in Cleveland³ and a half-dozen other large cities; (8) trade or business taxes, found in New Orleans and some other municipalities of the South and West, and much less common than in French and German cities, although, in view of the cutting off of revenue from licenses, likely to be more widely adopted in the near future; (9) special assessments levied upon property-owners to meet a large part of the cost of local improvements, such as street paving and laying sewers;⁴ and (10) special land taxes and unearned increment taxes, which have been experimented with in a few American and Canadian cities.⁵

The total revenue from all of these sources is, as a rule, scarcely adequate to meet ordinary running expenses.⁶ Consequently, when new enterprises are started resort generally has to be made to loans. These usually take the form of either sinking fund or serial bond issues.⁷ Many charters or state laws require a popular referendum to be taken before bonds of either description can be issued. Furthermore, in practically all states there is either a constitutional or a statutory limitation upon the amount of indebtedness

Indebted-
ness

¹ M. N. Halsey, "Municipal Vehicle Taxation," *Nat. Mun. Rev.*, XVI, 181-184 (Mar., 1927).

² In Chicago, in 1923, license fees were exacted from 137 different occupations or pursuits; and in New York, in 1926, from over 150.

³ See H. J. Reber, "The Community Trust," *Nat. Mun. Rev.*, VI, 366-371 (May, 1917).

⁴ See Nat. Mun. League Committee on Sources of Revenues, "Special Assessments," *Nat. Mun. Rev.*, XI, 43-58 (Feb., 1922).

⁵ R. M. Haig, "New Sources of City Revenue," *Nat. Mun. Rev.*, IV, 594-603 (Oct., 1915); L. W. Lancaster, "Sources of Revenue in American Cities," *Annals of Amer. Acad. Polit. and Soc. Sci.*, XCV, 123-132 (May, 1921). On the single tax in American cities, see *Nat. Mun. Rev.*, III, 737-741 (Dec., 1914); *ibid.*, IV, 616-621 (Oct., 1915); A. N. Young, *The Single Tax Movement in the United States* (Princeton, 1916).

⁶ L. D. Upson, "What Our Cities Can Afford to Spend," *Nat. Mun. Rev.*, XVI, 462-466 (July, 1927).

⁷ See pp. 801-802.

that cities may incur.¹ The object of the latter restriction is wholesome. But, although the debt limit is usually fixed in some ratio to taxable valuation, and is therefore not strictly uniform, it takes no account of the varying resources and financial condition of different cities, and, in its actual operation, is open to serious criticism. Nothing of the sort is found in European countries.

Subject to such limitations as may be set by the state constitution or laws, determination of the kinds of taxes to be employed and the amounts to be levied is exclusively a function of the council or commission, as the body directly representing the taxpayers.² It is likewise exclusively a function of this body to pass the annual appropriation ordinance, allotting the city's income to the various departments and activities. The compilation and revision of the estimates of the financial needs of the different departments, together with a forecast of the amount of revenue to be expected from various sources—in other words, the preparation of the budget—is another most important phase of the city's financial activities. Different cities follow different budgetary methods: in New York the preparation of the budget is assigned to a special body called the board of estimate and apportionment, consisting of the mayor, the comptroller, the president of the board of aldermen, and the five borough presidents;³ in Chicago and many other cities not under commission government the budget is prepared by a committee of the city council; in commission-governed cities it is prepared by the commission, and in commission-manager cities by the manager; while in Boston and some other places the mayor alone is made responsible for the program of expenditures. The enactment of the budget, with or without modifications, takes the

¹H. Secrist, "Constitutional Restrictions on Municipal Debt," *Jour. Polit. Econ.*, XXII, 365-383 (Apr., 1914); also *Nat. Mun. Rev.*, III, 682-692 (Oct., 1914); H. G. Loeffler, "Municipal Tax Limits and Economy," *Nat. Mun. Rev.*, X, 475-480 (Sept., 1921); A. R. Atkinson, *The Effects of Tax Limitations Upon Local Finances in Ohio, 1911-1912* (Cleveland, 1923); C. E. Rightor, "The Bonded Debt of 210 Cities," *Nat. Mun. Rev.*, XV, 350-358 (June, 1926).

²Tables showing the comparative tax rates in a large number of cities, 1922-1927, appear in *Nat. Mun. Rev.*, XI, 412-416 (Dec., 1922); *ibid.*, XII, 719-728 (Dec., 1923); *ibid.*, XIII, 698-708 (Dec., 1924); *ibid.*, XIV, 753-764 (Dec., 1925); *ibid.*, XV, 706-709 (Dec., 1926); *ibid.*, XVI, 778-789 (Dec., 1927).

³L. Hall, "Paying the City's Bills," *Outlook*, CXXIV, 474-477 (Mar. 17, 1920). The New York City budgets for 1923 and 1925 are conveniently summarized in *Nat. Mun. Rev.*, XII, 99-100 (Feb., 1923); *ibid.*, XIII, 724-725 (Dec., 1924). On the budget for 1927, see S. Chase, "New York: a Two-Billion Dollar Concern," *N. Y. Times*, May 22, 1927; M. Adams, "New York's Budget: the Tale of a City," *ibid.*, Nov. 20, 1927. On Philadelphia budget procedure, see *Annals Amer. Acad. Polit. and Soc. Sci.*, XCV, 237-242 (May, 1921).

form of the annual appropriation ordinance, and is the proper function of the city council or commission. In this way that body is made responsible, at least in part, to the taxpayers for the uses to which the city's money is put.¹ Sometimes the mayor is given a limited veto power over separate items in the appropriation bills; and in Boston, New York, and a few other cities the council may modify the budget as presented to it only by reducing the amount appropriated for any given purpose or by striking out items.

CHAP.
XLIX

The assessment of taxes, the collection of revenues from all sources, and their expenditure in accordance with the appropriation ordinances are distinctly administrative functions which are exercised by one or more city departments or officials. The assessment of property for the purpose of municipal taxation is sometimes performed by county officials, but generally each city forms a separate unit with its own corps of assessors, who seldom, if ever, enter upon their task with such training or experience as would qualify them to perform this extremely important work with any approach to scientific method or accuracy. In recent years a few cities have introduced improvements in this connection which have attracted wide attention.²

Assessment
and collec-
tion of
taxes

The city treasurer serves as the custodian and disbursing officer of municipal funds. The revenues of the city may be paid to him directly by the taxpayers or collected by another official called the city tax collector and then turned over to the treasurer. Department heads draw requisitions or warrants upon the treasurer from time to time for the amounts allotted to their department in the appropriation ordinance. But before these warrants are honored by the treasurer they must be approved by the city auditor or comptroller.

Disburse-
ments and
accounts

¹ M. B. Sayles, "The Citizen and the Budget," *Outlook*, XCII, 1048-1059 (Aug. 28, 1909); J. W. Routh, "Humanizing the Budget," *Nat. Mun. Rev.*, VIII, 598-600 (Nov., 1919); L. D. Upson, "The Other Side of the Budget," *ibid.*, XII, 119-122 (Mar., 1923); F. R. Kent, "Emptying a City's Pork Barrel," *World's Work*, LII, 176-180 (June, 1926); L. D. Upson and C. E. Rightor, "Standards of Financial Administration," *Nat. Mun. Rev.*, Supplement, XVII, 119-132 (Feb., 1928).

² Bureau of Governmental Research, "Assessing Detroit Property," *Public Business*, No. 67 (May 10, 1922); L. Purdy, "The Assessment of Real Estate," *Nat. Mun. Rev.*, Supplement, VIII, 512-527 (Sept., 1919); *Report of N. Y. Special Joint Committee on Taxation and Retrenchment* (1920), Chap. x; *ibid.*, (1921), 48-62, on assessment methods in New York cities; L. Gulick, "The Trend of Assessed Values in New York City," *Nat. Mun. Rev.*, XII, 697-700 (Dec., 1923); W. Turn, "New York City's New Assessed Valuations," *ibid.*, XV, 631-632 (Nov., 1926); A. S. Bard, "Tall Taxes for Tall Buildings," *ibid.*, XVI, 234-242 (Apr., 1927); L. Gulick, "The Assessor's Record Card," *ibid.*, XIII, 355-358 (July, 1924).

Finally, it is highly desirable that the accounts of all city departments be kept in accordance with a single, uniform, scientific method. This feature of an up-to-date fiscal system is unfortunately too frequently lacking. But the past few years have brought rather widespread adoption of improved methods of departmental accounting, as is notably illustrated in Philadelphia and Dayton. On the whole, considerably greater success has been achieved in reforming the financial, purchasing,¹ and general administrative methods of cities than has been attained in connection with state governments.

REFERENCES

- L. D. Upson, *The Practice of Municipal Administration* (New York, 1926), Chaps. IV-XIII, XVI-XVIII, XX-XXXI.
- W. B. Munro, *Municipal Government and Administration* (New York, 1923), II, Chaps. XXVI-XXX, XXV-XLIV.
- H. G. James, *Municipal Functions* (New York, 1917), Chaps. III-XII.
- C. Zueblin, *American Municipal Progress* (rev. ed., New York, 1916), Chaps. III-VI, XVI-XVIII.
- F. J. Goodnow and F. G. Bates, *Municipal Government* (New York, 1920), Chaps. XII-XV.
- C. A. Beard, *American City Government* (New York, 1912), Chaps. v, VII-X, XII-XIV.
- W. Anderson, *American City Government* (New York, 1925), Chaps. XX-XXII.
- A. E. Buck, *Municipal Budgets and Budget-Making* (New York, 1925).
- , *Municipal Finance* (New York, 1926).
- F. A. Cleveland, *Municipal Administration and Accounting* (New York, 1909).
- E. J. Ward, *The Social Center* (New York, 1913).
- W. P. Capes and J. D. Carpenter, *Municipal House-Cleaning* (New York, 1918).
- M. L. Cooke, *Our Cities Awake* (Garden City, 1918).
- Report of* [New York] *Special Joint Commission on Taxation and Retrenchment* (Retrenchment Section, 1920), Chaps. I-X.
- W. A. Somers, "The Valuation of Real Estate for Taxation," *Nat. Mun. Rev.*, II, 230-238 (Apr., 1913).
- H. L. Lutz, "The Somers System of Realty Valuation," *Quar. Jour. Econ.*, XXV, 172-181 (Nov., 1910).

¹ On centralized purchasing in New York City see *Nat. Mun. Rev.*, II, 239-250 (Apr., 1913); *ibid.*, IV, 224-230 (Apr., 1915); *ibid.*, V, 351-353 (Apr., 1916); Cincinnati, *ibid.*, II, 251-254 (Apr., 1913); San Francisco, *ibid.*, XIII, 137-140 (Mar., 1924); in city manager cities, *ibid.*, XIII, 631-641 (Nov., 1924); R. Forbes, "Centralized Purchasing in City-Manager Cities" *City Managers' Mag.*, VII, 186-194 (Mar., 1925). Whatever the purchasing method, it should be accompanied by a careful system of inspection and testing. See J. A. Duniway, "Standardization and Inspection" [in Philadelphia], *Amer. Polit. Sci. Rev.*, X, 315-319 (May, 1916); G. A. Gray, "What a Testing Laboratory Means to a City Government" [Cincinnati], *Nat. Mun. Rev.*, X, 330-334 (June, 1921).

- L. Purdy, *The Assessment of Real Estate* (3rd ed., New York, 1923).
 F. M. Babcock, *The Appraisal of Real Estate* (New York, 1924).
 J. A. Zangerle, *Principles of Real Estate Appraising* (Cleveland, 1924).
 G. B. Mangold, *Problems of Child Welfare* (New York, 1916), Parts I-II.
Annals of Amer. Acad. of Polit. and Soc. Sci., CV, 144-161 (Jan., 1923).
 Series of articles on "Public Welfare in the United States."
 C. Aronovici, *Housing and the Housing Problem* (Chicago, 1920); "Constructive Housing Reform," *Nat. Mun. Rev.*, II, 210-220 (Apr., 1913).
 L. Veiller, *Housing Reform* (New York, 1910).
 T. Adams, "Modern City Planning: Its Meaning and Methods," *Nat. Mun. Rev.* XI, 157-177 (June, 1922).
 F. B. Williams, *The Law of City Planning and Zoning* (New York, 1922).
 ———, "The Law of the City Plan," *Nat. Mun. Rev.*, Supplement, IX, 663-690 (Oct., 1920).
 T. Kimball, *Manual of Information on City Planning and Zoning* (Cambridge, 1923).
 R. H. Whitten, "The Building Zone Plan of New York City," *Nat. Mun. Rev.*, VI, 325-336 (May, 1917).
 C. H. Cheney, "Zoning, in Practice," *ibid.*, IX, 31-43 (Jan., 1920).
 E. M. Bassett, "Zoning," *ibid.*, Supplement, IX, 315-341 (May, 1920).
 N. F. Baker, "The Constitutionality of Zoning Laws," *Illinois Law Rev.*, XX, 213-248 (Nov., 1925).
 The development of American city plans may be traced in *Nat. Mun. Rev.*, IV, 383-397 (July, 1915); V, 388-394 (July, 1916); V, 638-646 (Oct., 1916); VI, 598-604 (Sept., 1917); VII, 605-612 (Nov., 1918); IX, 21-31 (Jan., 1920); X, 39-50 (Jan., 1921); XI, 27-33 (Jan., 1922); XII, 77-82 (Feb., 1923); XIII, 103-110 (Feb., 1924); XIV, 162-168 (Mar., 1925); XIV, 307-314 (May, 1925); XIV, 473-476, 501-505 (Aug., 1925); XV, 342-349 (June, 1926); XVI, 369-373 (June, 1927).

CHAPTER L

TOWNSHIPS, VILLAGES, AND SPECIAL DISTRICTS

Other
local
government
units

The New
England
town

The town-
meeting

Next to cities in importance as local government units are the towns and townships which are found in the great group of states comprising New England, New York, Pennsylvania, and the north central states, including Nebraska and the Dakotas. In the South and Far West, on the other hand, township government is practically non-existent. Functions which elsewhere are performed by town government are, in these regions, exercised by the county authorities, or are divided up among relatively unimportant county divisions (like the road districts in some Illinois counties), which have no corporate powers and seldom have the authority to levy taxes. In sharp contrast with these anemic local government units of the South and West are the town governments of New England, which are still vigorous and flourishing, although some of them are older than the counties and states under which they operate.

New England towns¹ have practically all of the rights of municipal corporations, and, although without charters, they enjoy almost all of the powers that a city charter confers. In addition to the management of purely local affairs, the town acts as the agent of the state in the assessment and collection of taxes, in keeping records of vital statistics and of land transfers,² in enforcing health laws, and in various other ways. Except in one or two states, the town is also the unit of representation in the state legislature for one house, or even both houses, and everywhere it is an election district for state and national purposes.

Most of the powers granted to New England towns are vested in, and exercised by, the town-meeting, which is the principal organ of town government.³ This is a mass-meeting of the qualified voters

¹ The New England town is not necessarily an urban center. Some of the towns are such, and have populations running into the thousands. But most of them are rural communities covering as much as twenty-five or thirty square miles. In other words, geographically they are broadly similar to the townships of other parts of the country.

² In Vermont, Connecticut, and Rhode Island.

³ G. E. Googin, "The Town Meeting," *Outlook*, LXXXII, 561-565 (Mar., 10, 1906).

of the town, held at least annually in the town hall. The assemblage is primarily a legislative body; and the actions that it takes may relate to a great variety of subjects of local interest, including the upkeep of the town water-works, cemetery, library, high school, town hall, and other public property; construction of a sewerage system; laying out and improving highways; authorizing contracts for street lighting; enacting local police regulations, known as by-laws; and, until recently, deciding whether licenses should be granted for the sale of liquor. An especially important function is that of providing the necessary financial legislation to meet the expenses of these and any other town enterprises; so the town-meeting fixes the tax rate, appropriates money for the different town activities, including the support of the public schools, and authorizes the borrowing of money when such a step becomes necessary. In the discussion of these varied items of business any voter present has a right to participate; and non-voters are also sometimes allowed to speak. Proceedings are carried on with at least nominal regard for the rules of parliamentary law. Not infrequently, subjects come up for consideration which arouse very general interest, and even divide the townspeople into hostile camps, and under these circumstances the proceedings reach their maximum of interest, and are attended by much of the excitement, speechmaking, and parliamentary manœuvering that characterize political conventions. At other times, proceedings are dull and lifeless, following merely the customary formality and routine.

As towns grow in population,¹ a general mass-meeting is found unwieldy and ill-adapted to the expeditious and thoughtful handling of business. Consequently some large towns have a permanent or standing advisory committee of from ten to forty members, appointed by the selectmen, to investigate any subject referred to them and to report their recommendations at a later meeting. Special committees are also sometimes designated for the same purpose. As a rule, committee recommendations carry great weight with the assembled voters.

The policies determined upon in town-meeting are carried out,

¹ The largest New England town is Brookline, Massachusetts, just outside of Boston, which has a population of more than 42,000. This town has recently adopted a limited town-meeting system, and eight other Massachusetts towns have taken similar action. See E. A. Cottrell, "Recent Changes in Town Government," *Nat. Mun. Rev.*, VI, 64-69 (Jan., 1917); J. F. Sly, "Contemporary Town-Meeting Government in Massachusetts," *ibid.*, XV, 444-446 (Aug., 1926); "Massachusetts Town-Meeting Bends but Does Not Break," *ibid.*, XV, 681-685 (Dec., 1926).

CHAP.
I
Executive
officers

Selectmen

Clerk

Treasurer

School
committee

Miscel-
laneous
officers

Western
townships

the taxes levied are collected, and the appropriations authorized are expended, by officers chosen by the town-meeting and directly responsible to it for the greater part of their official acts. But instead of a single chief executive to carry into effect the will of the local lawmaking body, one finds a variety of boards or single officials, usually chosen directly by the voters. The most important of these is the small group of three, five, or sometimes nine, persons called the selectmen. Chosen by the town-meeting, and comprising a sort of executive committee of that body, these officials act almost entirely as the town-meeting directs and hence enjoy very little independent or discretionary authority. They are generally elected for a single year, although reëlections are very common; and they manage town affairs from one general meeting to the next. Second to them in importance is the town clerk, also elected annually, but often continued in office year after year until he becomes the acknowledged authority on town history, precedents, and genealogy. He keeps the records of the town-meeting, issues marriage licenses, prepares vital statistics, and in Vermont, Rhode Island, and Connecticut records deeds, mortgages, and other legal documents. There is always a town treasurer, sometimes an auditor, and invariably at least one constable to arrest violators of the law, serve court processes, and act as tax collector.¹ There is also an elected school committee, or board, which in most New England states has the direct control of all the town schools. Finally, there is a long list of minor officials, most of whom are appointed by the selectmen and have merely nominal duties: for example, justices of the peace; road surveyors charged with keeping public roads and bridges in repair; field-drivers and pound-keepers; fence-viewers, who settle disputes among farmers in regard to boundary lines; sealers of weights and measures, who test the accuracy of scales and measures; surveyors of lumber; keepers of almshouses; park commissioners; fish wardens; hog-reeves; inspectors of various kinds; and numerous other minor officials, some of whom bear quaint titles and have merely nominal duties. Many of these officers serve without pay or, at the most, receive small fees.

Unlike the towns of New England, New York, New Jersey, and Pennsylvania, which have very irregular boundaries and differ greatly in area, the townships of the middle-western states are, with rare exceptions, of uniform size and shape, consisting of a

¹See W. L. Wallace, "Constables and Justices of the Peace in Iowa," *Nat. Mun. Rev.*, XIII, 7-10 (Jan., 1924).

rectangle approximately six miles square with straight sides.¹ These are often called civil townships in order to distinguish them from the geographical or congressional townships of the same size and shape which were mapped out when the original land-surveys were made under authority of an act of Congress. Their boundaries may or may not coincide with those of the congressional townships, but there is no necessary legal or political connection between the two. Congressional townships are found practically everywhere west of the Alleghenies, whereas civil townships exist only in the states of the Middle West; and in several of these, notably Illinois, Nebraska, and Missouri, they are to be found in only certain parts of the state. The boundaries of civil townships are always determined by the state or county authorities, whereas those of congressional townships are laid down by officials of the national government. Finally, the civil township is an important unit of local government, while the congressional township has no governmental organization and performs no governmental functions, serving almost solely as the basis for land surveys and records.

CHAP.

L

Although the western civil township, as a municipal corporation, has substantially the same legal status as the New England town, and has elective officers closely corresponding both in title and in functions to those of its eastern prototype, the most distinctive feature of New England town government, *i.e.*, the town meeting, is either entirely absent or exists in a greatly attenuated form. Town officers may be elected in what is called a town-meeting, and questions may be submitted for popular approval. But in the northern tier of central states, including New York and New Jersey, township meetings have very much less authority than in New England; nowhere west of the Hudson does the town-meeting show any such vitality as has characterized it in its native habitat.² And in the southern tier of central states, including Pennsylvania, Ohio, Indiana, Iowa, Kansas, and Missouri, there is no assembly of the township voters at all.

Township
government

Corresponding to the New England selectmen—a title, however, which nowhere appears in the central states—is a committee or board of supervisors or trustees in Pennsylvania, Ohio, and Minnesota. In other states there is a well-defined head official, quite unlike any New England official, called the supervisor in New

¹ The rectangular system is found also in the northern part of Maine.

² See *Ill. Const. Conv. Bull.*, No. 12 (1920), "County and Local Government in Illinois," 1024 ff.

York, Michigan, and Illinois, and township chairman or township trustee in other states. Remaining township officers correspond rather closely, both in name and function, to the officers of the New England town.

On the whole, township government, outside of New England, plays a relatively unimportant rôle. This is especially true in the West, where the township is an artificial area, almost totally lacking the social unity of the old New England town. Other factors go to produce the same result: the relatively larger part taken by county officials in poor-relief, and in highway and school administration, and the common practice of incorporating portions of townships as separate municipal corporations, thus taking them largely out from under the jurisdiction of the township authorities. To a brief description of the most important of these corporations, called villages, a few paragraphs must be devoted.

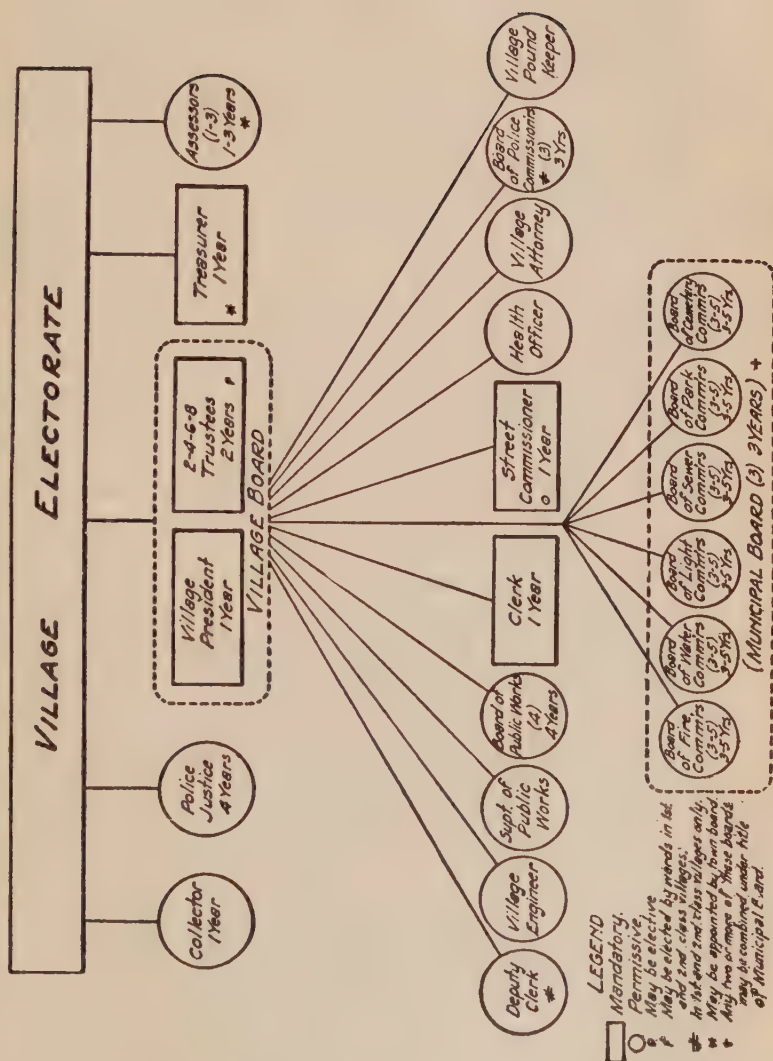
Villages

When a portion of a township, or of a county which does not have township government, becomes more thickly settled than the rest and begins to take on a semi-urban aspect, its inhabitants are certain to demand more in the way of special public services, such as fire protection, street paving and lighting, water-supply and sewerage facilities, than the township or county authorities will care to undertake to provide. Sooner or later, therefore, such communities usually become incorporated as villages or boroughs. State law often requires that a community seeking incorporation as a village shall have a certain minimum population and occupy a certain minimum area, and that the question of incorporation shall have been previously submitted to popular vote. In Illinois, for example, any area of not less than two square miles, with at least three hundred inhabitants, if it is not already within a village or city, may be incorporated as a village by a vote of the people at a special election. It remains a village until it has a thousand inhabitants, when it may, but is not obliged to, change to a city government.¹ On the other hand, there are villages in Vermont, Maine, and Connecticut with as few as forty-two, eighty-three, and thirty-four inhabitants, respectively. Incorporation gives the village the power to undertake the special community services mentioned above, and for these purposes to borrow money and raise taxes, and to have its own village government distinct from the

¹ Oak Park, a suburb of Chicago with more than 30,000 inhabitants, still retains the village form of government. Speaking broadly, the distinction between cities and villages is not one of size or importance but merely one of legal status.

COMPOSITE CHART OF VILLAGE GOVERNMENT IN THE STATE OF NEW YORK

(As established by the Village Law)



(REPORT OF SPECIAL JOINT COMMITTEE ON TAXATION AND RETRENCHMENT, 1923.)

governments of township and county. There are more than ten thousand of these incorporated villages in the United States. They are found in all parts of the country, including New England and the southern and western states; but by far the greater number are in the north-central section, there being about eight hundred in Illinois alone. In this region they are also relatively larger and more important than elsewhere. The boroughs of Connecticut and Pennsylvania and the incorporated towns of Illinois are merely villages under other names.

The government of villages is a comparatively simple affair. In some states, notably New York, there is a village meeting much like the town meeting, but attended, of course, only by the qualified voters of the village. In most states, on the other hand, there is no such meeting and the decision of practically all questions is left to certain elected officials. In such villages the principal governing body is the village board, called by such various names as trustees, assessors (Maine), commissioners (New Hampshire), burgesses (in boroughs), or the village council. Other village officers include a mayor or president or chief burgess, who is the village chief executive, and is sometimes given a veto upon the acts of the village board; also a clerk, a treasurer, a marshal or police officer, and a police magistrate with functions similar to those of a justice of the peace. Thus in structure and functions the government of villages bears a striking resemblance to the government of cities, except, of course, that usually it is on a decidedly smaller scale. Indeed it might almost be said that villages are miniature cities; at any rate, they often mark transitional stages in the evolution of cities from what were originally rural communities.

No description of local government in the United States today is complete which does not at least mention the newer districts that have been created in many parts of the country to fulfil some special purpose for which the older units of local government have been found wholly or largely inadequate. These are commonly called special, or quasi-municipal, corporations, in order to distinguish them from the older municipal corporations called cities and villages. Sometimes these newer districts lie wholly within the boundaries of a city, a town, or even a village; and generally they are entirely within a county. Nevertheless their boundaries seldom coincide exactly with those of the older political subdivisions. In the majority of instances, they are unions of two or more villages, townships, or small cities, or they comprise territory lying within

more than one such unit. At all events, and despite the fact that they may contain practically the same inhabitants, they are legally quite independent of county, township, village, or city authorities in dealing with matters falling within their jurisdiction.

CHAP.

L

How extensively these special municipal corporations have developed, particularly in recent years, is indicated by the fact that in 1918 eighty-three varieties were mentioned in the legislation enacted by thirty-four states.¹ For convenience, all may be classified in five main groups: (1) school districts, (2) public utilities districts, (3) sanitary districts, (4) water-control districts, and (5) miscellaneous.

Classifica-
tion:

School districts are probably the oldest and most numerous of these local subdivisions; they are also more widely distributed over the country, and they appear in a larger variety of forms, than any other class unless it be the fifth named. No less than seventeen different species have been discovered and catalogued, five or six not infrequently being found in the same state.² A school district is the unit of local government with which the great majority of native Americans first come into conscious personal contact, and no organ of local government possesses greater potentialities for the training of intelligent and useful citizens. By whatever name they may be called, all such districts exist for essentially the same purposes: to provide the necessary land, buildings, and teachers, and to levy and appropriate the necessary taxes, for the maintenance of elementary, secondary, and high schools. Each district has its school board, school committee, or board of education, usually elected by popular vote in smaller communities, but commonly appointed in places of considerable size. This board generally selects a clerk or secretary, a treasurer, and, in the larger places, a school superintendent.

1. School
districts

Public utilities districts have been created in considerable variety for the sole, or chief, purpose, as the name indicates, of constructing, owning, and operating works necessary to provide the inhabitants of the district with water, gas, electricity, or transportation. They require no special comment.

2. Public
utilities
districts

Sanitary districts, under various names, have for their main object the improvement and protection of the public health by providing for the establishment of boards of health and the crea-

3. Sanitary
districts

¹ *Amer. Polit. Sci. Rev.*, XIV, 286-291 (May, 1920).

² *Ibid.*, 290, note 24.

tion and maintenance of drainage and sewerage systems.¹ The best-known example is the Sanitary District of Chicago, established in 1889, which comprises, in addition to the entire urban territory, one hundred ninety-five square miles outside of the city, and ninety-seven per cent of the population of Cook county. At a cost of nearly one hundred million dollars, the trustees of this district have constructed, and now operate, over sixty miles of canals connecting the Chicago and Illinois rivers, together with the necessary engineering works for reversing the current of the Chicago river. As a result, the sewage of Chicago is no longer turned into Lake Michigan, but is diverted into the Illinois and Mississippi rivers.²

4. Water-control districts

Water-control districts have to do primarily with impounding or distributing water supplies, diverting water courses, draining swamps, or protecting given areas against floods or tidal waves. Perhaps the most common illustrations are the irrigation, drainage, or reclamation districts which have been established in about a dozen states. Seven hundred reclamation districts are found in California alone, and an even greater number of drainage districts in Illinois.

5. Miscellaneous districts

In the miscellaneous class one finds a heterogeneous, not to say motley, array of local-government districts; road, paving, and bridge districts, in a dozen states; fire and forest-fire districts in New England, New York, and California; forest-preserve districts;³ local improvement districts or associations, almost without number; and a large assortment of park districts. Chicago, for example, has no fewer than seventeen park districts, each with its own governing body and all but one with power to levy and appropriate taxes for park purposes.⁴

¹ W. M. Olson, "The Value of Sanitary Districts," *Amer. City*, XXVII, 557-563 (Dec., 1922); F. P. Gruenberg, "Incorporated Districts—Blessings or Drawbacks?" *ibid.*, XXVIII, 593-595 (June, 1923).

² G. A. Soper, *Report to the Chicago Real Estate Board on the Disposal of Sewage and Protection of Water Supply of Chicago* (1915); Trustees of the Sanitary District of Chicago, *Memorandum Concerning the Drainage and Sewage Conditions in Chicago*. . . (1923; *Literary Digest*, LXXXIV, Jan. 31, 1925, pp. 8-9, "Press of the Great Lakes on Chicago's Diversion of Water.")

³ Perhaps the most important of these forest preserve districts is that of Cook county, Illinois, created in 1915 for the purpose of providing for the metropolitan district of Chicago an elaborate system of outer parks and connecting boulevards. More than 25,000 acres have been acquired and permanently set apart for recreational purposes. See Forest Preserve Commission, *Forest Preserves of Cook County, Illinois* (1918).

⁴ There are numerous other political subdivisions in every state which are not described in this portion of the book; for example, congressional districts for the election of representatives in Congress; assembly and senatorial districts for the election of members of the state legislature; judicial districts

In the methods by which these special districts are created, in their form of government, and in the powers which they enjoy, there is, the country over, the greatest diversity. All, however, are endowed with some of the attributes of a municipal corporation, including the right to acquire, hold, and dispose of property, to sue and be sued in the courts, to have a corporate seal, to pass regulations called by-laws, and, most important of all, to levy taxes, issue bonds, and take such other steps as may be authorized by law for the accomplishment of the special objects for which the district has been created. These corporate powers are generally exercised through a small governing body of commissioners, directors, or trustees, who are either elected by popular vote, or, less frequently, appointed by some of the state or county authorities. Almost invariably, they serve for short terms and without compensation.

CHAP.
LCorporate
powers

In many—perhaps most—instances these special municipal corporations have served useful purposes and have justified their establishment. Nevertheless, their multiplication has yielded at least two unfortunate results: it has given rise in some states to a most bewildering system of local government; and it has burdened the voters, in those states particularly, but everywhere in some degree, with an excessively long ballot. To Illinois belongs the rather dubious distinction of having perhaps the most intricate system of local government of any state in the Union. Besides 102 counties and over 70 cities of more than 5,000 inhabitants, there are more than 1,400 townships, about 800 villages, more than 12,000 school districts of one kind or another, and 800 drainage districts, besides sanitary districts, incorporated towns, and park and road districts, whose number is large but not exactly known. The nadir has been reached in the local government system in Cook county, which constitutes a veritable jungle: in the city of Chicago there are no less than thirty-eight distinct local-government units, most of them independent of one another; while outside of the city, in the area of the sanitary district, there are 162 other local governments; and beyond the sanitary district there are 192 additional local governments—making a grand total in Cook county of 392

for the choice of judges of the circuit, district, superior, supreme, or other state courts; and probate districts in New England for the election of judges of the probate courts. These districts usually embrace more than one county, although the most populous counties are frequently divided into two or more districts. As these divisions exist solely for electoral or judicial purposes and have no governmental organization or corporate powers, description of them is unnecessary in the present connection.

Undesir-
able
resultsExcessive
complexity
of local
government

separate units of government. Naturally one finds a bewildering maze of elective officials. There are 423 elective officers in Chicago, 1,648 in the sanitary district, and 2,571 in the entire county. Every voter in Chicago is expected to vote for at least 191 different officials in a period of about nine years; while in other parts of the county a voter is supposed to have a voice in filling from 180 to 205 different positions in the same stretch of time.¹

Superficially, all this appears like democratic government exalted to the *n*th power. But if the tests of true democratic government were applied to such situations, plenty of instances could be found of little oligarchies masquerading in the trappings of democracy, and of the cloven hoof of autocracy protruding from beneath the cloak of democratic forms. Simplification and unification, to a far greater degree than commonly prevails, are the outstanding needs of both our state and local governments; indeed, they are indispensable prerequisites to the effective functioning of these governments as instruments of a real democracy. Verily, verily, true democratic government consisteth not in a multitude of elective officers, but, rather, in the discriminating popular choice of a few who are continuously sensible of their responsibility to an electorate at once informed, intelligent, and alert.

REFERENCES

- K. H. Porter, *County and Township Government in the United States* (New York, 1922), Chaps. II-III, XVI-XVII.
 J. A. Fairlie, *Local Government in Counties, Towns, and Villages* (New York, 1906), Chaps. VIII-XI.
 ———, "Reorganization in Counties and Towns," *Annals. Amer. Acad. Polit. and Soc. Sci.*, CXIII, 187-194 (May, 1924).
 ———, "County and Town Government in Illinois," *ibid.*, XLVII, 62-80 (May, 1913).
 H. G. James, *Local Government in the United States* (New York, 1921), Chap. v.
 A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (New York, 1914), I, 497-498; III, 541-546.
 J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), I, Chaps. XLVIII-XLIX.
 E. Kimball, *State and Municipal Government in the United States* (Boston, 1922), Chap. XVIII.

¹ See *Ill. Const. Conv. Bull.*, No. 11 (1920), "Local Governments in Chicago and Cook County," 935; *ibid.*, No. 12, "County and Local Government in Illinois," 1036. Election expenses for national, state, and local offices cost the taxpayers of Cook county in 1920 over \$2,200,000. See Chicago Bureau of Public Efficiency, *Growing Cost of Elections in Chicago and Cook County* (1912); *ibid.*, *The High Cost of Elections in Chicago and Cook County* (1921).

C. L. Fry, *American Villagers* (New York, 1926).

F. G. Bates, "Village Government in New England," *Amer. Polit. Sci. Rev.*, CHAP.
L
VI, 367-385 (Aug., 1912).

G. E. Howard, "Local Constitutional History in the United States," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, extra vol. IV (Baltimore, 1889).

W. F. Dodd, "Political Geography and State Government," *Amer. Polit. Sci. Rev.*, XIV, 242-276 (May, 1920).

C. Kettleborough, "Special Municipal Corporations," *ibid.*, VIII, 614-621 (Nov., 1914).

F. H. Guild, "Special Municipal Corporations," *ibid.*, XIV, 286-291 (May, 1920).

Ill. Const. Conv. Bull., No. 11 (1920), "Local Governments in Chicago and Cook County," and *ibid.*, No. 12, "County and Local Government in Illinois."

Chicago Bureau of Public Efficiency, *Unification of Local Governments in Chicago* (Chicago, 1917).

Report of [New York] Special Joint Committee on Taxation and Retrenchment (1923), pp. 26-27, 43-48, 112-115, 194-196, 221-225, Chaps. VI, XI.

APPENDIX

CONSTITUTION OF THE UNITED STATES OF AMERICA

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION I

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION II

The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons,¹ including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.² The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term

¹ Altered by Fourteenth Amendment.

² Rescinded by Fourteenth Amendment.

of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.¹

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

SECTION III

The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.²

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year; of the second class, at the expiration of the fourth year, and of the third class, at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.³

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a President *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of the President of the United States.

¹ Temporary provision.

² Modified by Seventeenth Amendment.

³ Modified by Seventeenth Amendment.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION IV

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION V

Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy, and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION VI

The Senators and Representatives shall receive a compensation for their services, to be ascertained by law and paid out of the Treasury of the United States. They shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SECTION VII

All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States; if he approves he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on

a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII

The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations and among the several States, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

SECTION IX

The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.¹

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto law shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

¹ Temporary provision.

SECTION X

No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

ARTICLE II

SECTION I

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the

President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.¹

The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he may have been elected, and he

¹ Superseded by Twelfth Amendment.

shall not receive within that period any other emolument from the United States or any of them.

Before he enter on the execution of his office he shall take the following oath or affirmation:

“I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the Constitution of the United States.”

SECTION II

The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION III

He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public

ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION IV

The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

SECTION I

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION II

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; ¹ between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the

¹ Restricted by Eleventh Amendment.

said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION III

Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted.

ARTICLE IV

SECTION I

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION II

The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.¹

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.²

SECTION III

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdic-

¹ Extended by Fourteenth Amendment.

² Superseded by Thirteenth Amendment in so far as pertaining to slaves.

tion of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State.

SECTION IV

The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article;¹ and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the confederation.²

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the

¹ Temporary clause.

² Extended by Fourteenth Amendment.

supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in convention by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.¹

¹ The signatures are here omitted.

AMENDMENTS

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

ARTICLE V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of

life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X¹

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI²

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

¹The first ten amendments seem to have been in force from November 3, 1791.

²Proclaimed in force January 8, 1798.

ARTICLE XII¹

The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

¹ Proclaimed September 25, 1804.

ARTICLE XIII ¹

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV ²

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid

¹ Proclaimed December 18, 1865.

² Proclaimed July 28, 1868.

or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each house, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV¹

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI²

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII³

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the elec-

¹ Proclaimed March 30, 1870.

² Proclaimed February 25, 1913.

³ Proclaimed May 31, 1913.

tion or term of any Senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII ¹

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

ARTICLE XIX ²

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

¹ Proclaimed January 29, 1919.

² Proclaimed August 26, 1920.

INDEX

A

- Absent-voting laws, 611-612
- Administration (national), machinery, 52-53
 - problems, 53-54
 - under heads of departments, 279-286
 - the civil service, 286-301
 - movement for reorganization, 341-346
- See also* Civil Service; also individual executive departments
- Administration (state), growth, 752-753
 - activities, 754-755
 - agencies, 755-756
 - appointments, 757
 - bi-partisan boards, 758
 - defective organization, 757-761
 - spoils system, 759
 - purchasing methods, 762
 - reorganization, 763-769
 - civil service reform, 769-772
 - references on, 773-774
- Administrative reorganization (national), 341-346; (state), 763-769
- Advisory opinions, 441, 809
- Agriculture, Department of, established, 333
 - special characteristics, 333-334
 - divisions and activities, 334-335
 - relation to grants-in-aid, 559-564
- Air forces of the United States, 319-320
- Alaska, government of, 576-578
- Aldermen, in New York, 915 n
- Aliens, status, 156
 - naturalization, 161
- Amendment, of national constitution, modes, 179-182
 - changes made by, 182-186
 - criticism of process, 186-187
 - proposed changes, 188-189
- Amendment (of state constitutions),
 - by popular initiative, 660-662
 - by legislative proposal, 662-664
 - by constitutional convention, 664-669
 - recent developments, 670
- American government, reasons for studying, 67-69
- Anarchism, attitude toward the state, 17-18
- Annapolis convention, 101-102
- Anti-Masonic party, 623
- Anti-trust laws, 541-547
- Appointment, power exercised by
 - president, 236-237
 - rôle of Senate, 237-238
 - by courts and heads of departments, 238-239
 - in executive civil service, 292
 - power exercised by governor, 746-748
- Appropriations, by Congress, earlier methods, 497-500
 - under budget system, 500-509
- Appropriations (state), earlier methods, 791-793
 - under budget systems, 794-799
- Arizona, admitted to the Union, 142
- Army, of United States, 316
- Assessment of taxes, 781, 783-785
- Articles of Confederation, adopted, 93
 - form of government provided, 94-96
 - in operation, 96-100
 - proposed revision, 100-102
- Attainder, bills of, 169
- Attorney-General, of United States, 320-322
 - state, 751
- Autocracy, as a form of government, 31-34

B

- Bankruptcy, legislation on, 549-550
- Ballot, forms of, 851-852
 - shortening, 853-854
 - preferential, 855-856
- Banks, of the United States established, 510-512
 - system established during the Civil War, 512
 - defects of the system, 512-513
 - federal reserve system created, 513-516
 - land banks, 516-517
 - intermediate credit, 517

- Bicameral system, general features,
49-50
in national government, 347-348
in state government, 674-679
in city government, 915
- Bill of rights, desirability of, 61
in national constitution, 166-176
in state constitutions, 176-177,
658-659
- Bills of attainder, prohibited, 169
- Biology, relation to political science,
7-8
- Bi-partisan boards, in the states, 758
- Boards and commissions, in states,
752-755
- Boroughs, in American colonies, 79
in states, 972
- Bryce, Lord, classifies constitutions,
27-28
on federal government, 42
on private rights, 63-64
on the national constitution, 122-
123, 128
on importance of the states, 136
on quality of presidents, 273
on quality of Congress, 423
- Budget bureau, 501-506
- Budget system (national), movement
for, 500-501
introduced, 501
organization and workings, 501-
506
ancillary reforms, 506-507
economies under, 507-508
- Budget system (state), 762-763, 794-
799
municipal, 962-963
- Bureau of Corporations, 542
- Bureau of Efficiency, 294-295
- Bureau of Immigration, 531-532
- Bureau of Insular Affairs, 317-318
- "Business Organization of the Gov-
ernment," 508-509
- C
- Cabinet, question of an executive coun-
cil, 204-205
origins, 205-206
relations with president, 206
meetings and influence, 206-207
selection of members, 202-283
- Cabinet system, advantages of, 51-52
not likely to develop in United
States, 276-277
- Calendars, in House of Representa-
tives, 402-403
- Calhoun, John C., views on state sov-
ereignty, 120-121
- Campaign, presidential, 224
- Caucus, nomination of presidential
candidates by, 211-212
in Congress to-day, 386-388
- Census, Bureau of, 339
- Centralization, tendency toward, 564-
568
consequences, 568-569
- Centralized purchasing, in states, 762
in cities, 964
- Charter, in American colonies, 72-73
granted to cities, 898-899
special charter system, 900-901
general charter plan, 901-902
classification plan, 902-904
home rule plan, 904-906
optional plan, 906-907
- Checks and balances, 652-653
- Circuit courts, state, 809
- Circuit courts of appeal, 437
- Cities, growth, 897
relation to county government,
891-892
relation to state government, 906-
908
legal status, 898
charters, 898-906
legislative interference, 899-901
classification, 902-904
home rule, 904-906
optional charters, 906
administrative supervision of, 907-
908
administrative activities, 917
departmental organization, 917-
920
"federal" type of government, 920
commission government, 923-932
commission-manager government,
932-935
police administration, 938-941
protective activities, 938-949
criminal courts, 941-942
special courts, 942
psychopathic laboratories, 943
fire protection, 943-946
health protection, 946-949
water supply, 951-952
public works, 951-955
waste removal, 953-954
sewage problem, 953-954
streets, 954-955
social welfare activities, 956-958
school system, 958-960
finance, 960-964
budgets, 962-963
assessment of taxes, 963
disbursements, 963
centralized purchasing, 964
city planning, 964
references on, 909-910, 921, 935-
937, 949-950, 964-965

- Citizenship, obligations, 64
 - interstate, 151-152
 - defined, 156-158
 - by birth, 158-160
 - by collective naturalization, 160-161
 - by individual naturalization, 161-164
 - eligibility, 164-165
 - of married women, 165-166
- Civil service (national), extent, 279-280
 - rise of spoils system, 286-287
 - reform, 287-289
 - examinations, 290-291
 - appointments, 292
 - protection against removal, 292-293
 - restraints on partisan activity, 293-294
 - promotions, 294-295
 - problem of extension of merit system, 295-297
 - salaries, 297
 - classification, 298-299
 - pensions, 299
 - organization of employees, 299-301
- Civil service, in the states, 769-772
 - in cities, 919-920, 940, 942
- Classification, in civil service, 298-299
- Clayton Anti-Trust Act, 546
- Cleveland, Grover, and the Chicago strike, 255
- Closure, in the House of Representatives, 406-407
 - in Senate, 409-413
- Collectivism, attitude toward the state, 20-21
- Colonial governments, variation, 71
 - tendency toward a common pattern, 71-72
 - control from England, 72
 - charters, 72-73
 - governor, 73-75
 - governor's council, 75
 - legislature, 75-76
 - suffrage, 76-77
 - judiciary, 77-78
 - local authorities, 78-79
 - political ideas, 79-81
- Commerce, states restricted as to, 147-148
 - constitutional provision on, 522
 - importance of national control, 523
 - judicial definition, 523-524
 - foreign relations and, 524-525
 - embargoes, 525
 - tonnage duties, 525-526
- Commerce, navigation and inspection laws, 526
 - merchant marine, 527
 - laws stimulating, 527-528
 - protective tariff, 528
 - immigration laws, 528-532
 - interstate defined, 532-533
 - river and harbor legislation, 534-535
- Interstate Commerce Act, 535-537
- Interstate Commerce Commission, 537-541
 - anti-trust laws, 541-544, 545-548
 - Federal Trade Commission, 544-545
 - Clayton Anti-Trust Act, 546
 - Webb-Pomerene Act, 546-547
 - state laws affecting, 548
- Commerce, Department of, established, 336-337
 - bureau of foreign and domestic commerce, 336-337
 - subsidiary and miscellaneous bureaus, 337-338
 - patent office, 338
 - bureau of the census, 339
- Commission government, in cities, rise, 923-924
 - essential and incidental features, 924-925
 - variations in practice, 927
 - defects, 927-931
 - merits, 931-932
 - references on, 935-936
- Commission-manager government, in cities, beginnings, 932
 - selection of manager, 933
 - manager's functions, 934-935
 - results, 935
 - references on, 935-937
- Commissioners on Uniform State Laws, 730-731
- Committees, in House of Representatives, number and importance, 381-392
 - size, 382
 - mode of appointment, 382-383
 - seniority rule, 383-384
 - work of, 384-385
 - in Senate, 393-395
 - conference, 413-416
- Committees, in state legislatures, composition and number, 713-714
 - desirable reorganization, 714-715
 - interlocking system, 716
 - relation to budgetary reform, 716-717
 - Massachusetts system, 713, 719-721
- Comptroller-General, 501, 503
- Compulsory voting, 58, 613

- Conciliation and arbitration, 828
 Conference committees, in Congress,
 413-415
 in state legislatures, 716
 Congress (under Articles of Confed-
 eration), nature and powers,
 94-100
 considers revision of Articles, 100-
 101
 Calls constitutional convention,
 102
 Congress (under the constitution), de-
 cides when state government is
 republican, 139
 admits new states, 141-143
 assents to interstate agreements,
 144-145
 relation to state taxation, 145
 war powers, 252-253, 467-472
 control of president over sessions,
 260
 presidential messages, 260-262
 presidential vetoes, 262-266
 control over president, 270
 need of presidential leadership,
 271
 proposed seating of heads of de-
 partments, 274-275
 importance of, 347
 bicameral organization, 347-349
 regulation of elections, 354-355,
 363
 sessions, 371-372
 committees, 381-386, 393-395
 caucuses, 386-390
 physical surroundings, 396-397
 introduction of legislative meas-
 ures, 397-398
 multiplicity of bills, 398-399
 committee meetings, 400-402
 calendars, 402-403
 order of business, 403-406
 closure, 406-407, 411-413
 methods of voting, 407
 filibustering, 409-413
 conference committees, 413-415
 publicity of proceedings, 416
 published records, 416-418
 obstacles to business, 418-421
 lobbying, 421-422
 relative importance of the houses,
 422-423
 variety of functions, 456-461
 bases of legislative power, 461-466
 implied powers, 464-465
 resulting powers, 465-466
 exclusive and concurrent powers,
 466-467
 taxing powers, 474-480
 tariff legislation, 489-491
 appropriations, 497-509
 Congress, loans, 509-510
 regulation of banking, 512-517
 regulation of currency, 517-520
 regulation of commerce, 522-555
 power to acquire and govern ter-
 ritory, 573-576
 Congressional caucus, makes nomina-
 tions for president, 211-212
 Congressional Record, 417
 Connecticut Compromise, 110
 Constitution, different meanings of
 the term, 24-25
 development of written form, 25-
 26
 distinguished from statutes, 27
 contents, 27
 modes of growth, 27-30
 enumeration of private rights, 61-
 62
 Constitution (national), drafted at
 Philadelphia, 104-109
 the great compromises, 110-111
 Constitution (state), adopted, 87-88,
 656
 general features, 88-91
 length, 656-657
 contents, 659-660
 methods of amending, 660-669
 future of, 670-671
 references on, 671-672
 Constitutional conventions (state),
 664-669
 Consular service, 311-312. *See For-*
eign Service
 Continental Congress, 91-94
 Contracts, obligation of, 149-150
 Convention (1787), called, 102
 members, 104-105
 organization and procedure, 105-
 106
 main problem, 106
 Virginia and New Jersey plans,
 106
 necessity of compromise, 108
 decision for strong national gov-
 ernment, 108-110
 the great compromises, 110-111
 adopts the constitution, 112
 Convention (constitutional), in the
 states, 664-669
 Convention (nominating) rise, 212-213
 membership, 213-219
 physical surroundings, 219
 temporary organization, 219-220
 committees, 220-221
 platforms, 221
 nominations, 221-222
 "unit" and "two-thirds" rules,
 222-223
 in the states, 834-836
 Coördinating agencies, 508

Copyright, regulation of, 550-553
 Coroner, 877-878, 886
 Corporations, created by national government, 533-534
 Corrupt practices acts, 641-642, 843
 Council, in cities, 913-914, 915-917
 Council, judicial, 818
 Council, of colonial governor, 75
 County, origins, 79, 863
 changes in, 863-864
 general features, 864-866
 libraries, 865
 legal status, 866-867
 functions, 865-866
 restrictions on, 867
 executive, 870, 888
 charities, 872
 finance, 870, 890-891
 officers, 868, 873-879
 merit system, 873
 sheriff, 873-875
 prosecuting attorney, 875-877
 coroner, 877-878
 court clerks, 878
 criticism of, 881-895
 home rule charters, 882
 jails, 889
 poorhouses, 889
 consolidation with city, 891-892
 reforms, 892-895
 references on, 879-880, 895-896
 County board, 868-873, 883-884
 Courts. *See* Judiciary
 Court of Claims, 450
 Court of Customs Appeals, 450
 Crime, relation to courts, 813 n
 Currency, during Revolutionary period, 517-518
 new system after 1789, 518
 paper introduced and made legal tender, 518-519
 miscellaneous forms, 520
 Customs duties, 480, 484, 485

D

Debt, national, 509-510
 Declaration of Independence, 85, 93
 Declaratory judgments, 827
 Delaware, constitutional amendments in, 30
 Democracy, as a form of government, 32-38
 tested in America on large scale, 68
 tendency toward in American colonies, 80-81
 Democratic party, Jeffersonian origins, 619-621
 rivalry with Republican party, 628-630

Departmental reorganization bill, 344
 Departments (executive), general features, 280-282
 selection of heads, 282-283
 functions of heads, 284-286
 importance, 303
 See also individual departments
 Des Moines plan, in cities, 927
 Diplomatic service, 310-311
 See also Foreign Service
 Direction, president's power of, 242-244
 Disputed Presidential Election Act, 228
 District attorneys (federal), 451
 (state) 875-877
 District courts (federal), 435-437
 District of Columbia, government of, 592-593
 Districts, special, 972-974
 Dodd, W. F., quoted, 735 n
 "Due process," meaning, 170-172
 in relation to the states, 174-175, 825-826
 Supreme Court and, 175-176, 446-447

E

Economics, relation to political science, 6-7
 Economy and efficiency commissions, 757
 Educational tests for voting, 605-606
 Educational activities, in cities, 859-860
 Eighteenth Amendment, 185
 Election, of president and vice-president, 224-232
 of members of House of Representatives, 354-355
 of senators, 362-366
 plural voting, 58
 compulsory voting, 58, 612-613
 methods of voting, 58-59
 miscellaneous questions, 59-60, 647-648
 of state legislatures, 681-690
 of governor, 736
 laws, 847
 officers, 847-850
 ballots, 851-852
 system criticized, 852-856
 proportional representation, 687-690, 856
 Electoral college, provided for in constitution, 208
 early workings, 209-210
 changes introduced by Twelfth Amendment, 210-211
 election of members, 224-226

- Electoral college, casting the vote, 227
 proposed abolition, 231-232
 Electorate, relation to "the people,"
 56-57
 composition, 57-58
 plural voting, 58
 compulsory voting, 58, 612-613
 methods of voting, 58-59
 miscellaneous questions, 59-60,
 647-648
 history of suffrage, 600-604
 freedmen enfranchised, 601
 women enfranchised, 601-604
 present qualifications, 604-606
 restraints upon negro voting, 606-
 610
 general features today, 844
 Electrical voting, in legislatures, 701 n
 Eleventh Amendment, 183
 Embargoes, 525
 Eminent domain, 173
 England, control over American colo-
 nies, 72
 Equalization of assessments, 785
 Equity cases, 434
 Executive functions, 50
 form, 50-51
 election, 51
 presidential v. cabinet style, 51-
 52, 234, 276
 Executive agreements, 249-250
 Executive departments, created by
 Congress of the Confederation,
 96
 proposed representation in Con-
 gress, 274-276
 general features, 280-282
 selection of heads of, 282-283
 functions of heads of, 284-286
 See also various departments by
 name
 Expenditures, amounts and distribu-
 tion, 495-496
 former mode of appropriations,
 497-500
 budget system introduced, 500-
 501
 workings of budget system, 501
 by parties and candidates, 637-
 642
Ex post facto laws, 169-170
- F
- Family, relation to state, 15-16
 Farmer-Labor party, 632
 Federal land banks, 516-517
 Federal reserve banks, 513-516
 Federal Reserve Board, 515-516
 Federal Trade Commission, 544-545
 Federalism, characteristics, 41-43
 defects, 43-44
 tendencies away from, 44
 tested in America on large scale,
 68
Federalist, authorship and influence,
 114-115
 Federalist party, 618-621
 Fifteenth Amendment, 601
 Filibustering, in Senate, 409-413
 Finance (municipal) sources of reve-
 nue, 960-961
 debts, 961-962
 budgetary methods, 962-963
 disbursements, 963
 accounts, 964
 Finance (national), taxing clause,
 473-474
 restrictions on taxing power,
 475-478
 income taxes, 476-477
 scope of taxing power, 478-479
 internal revenue, 480-484
 customs duties, 484-486
 treasury system, 486-487
 enactment of revenue laws, 488-
 489
 tariff legislation, 489-491
 Tariff Commission, 491-494
 expenditures, 495-496
 Congress and appropriations, 497-
 500
 budget system, 500-509
 borrowing money, 509-510
 national banks, 510-513
 federal reserve system, 513-516
 federal land banks, 516-517
 intermediate credit banks, 517
 currency, 517-520
 Finance (state), sources of revenue,
 775-778
 general property tax, 778-783
 assessment methods, 781, 783-784
 equalization of assessments, 785
 tax commissions, 786
 taxes, kinds of, 777-778
 tax rates, 787
 collection of taxes, 787-788
 income taxes, 777
 inheritance taxes, 777
 custody of state funds, 789
 appropriations, 791-793
 debts, 800-801
 bond issues, 801-802
 budgets, 794-799
 references on, 802-803
 Fire departments, in cities, 943-946
 "Five to four" decisions, 447-448
 Floor leader, in House of Representa-
 tives, 388
 Force, theory of origin of state, 16

Foreign and domestic commerce, bureau of, 336-337
 Foreign relations, president's control over, 245-251
 Foreign service, reorganization in 1924, 307
 status of ministers and ambassadors, 308
 appointments, 308-309
 opportunities for careers, 309-310
 functions, 309-312
 Forest preserve district, 974 n
 Fourteenth Amendment, defines citizenship, 157-158
 penalty for disfranchisement not enforced, 610
 Free Soil party, 624

G

Garner, J. W., quoted, 9, 14, 17, 22-23, 41-42
 General Accounting Office, 501-502
 General property tax, theory of, 780
 objectionable features, 780-781, 783
 substitutes for, 782
 equalization of assessments, 785-787
 Gerrymander, 353-354, 683
 Gibbons v. Ogden, 192-193
 Government, reasons for studying, 5-6
 relation to other social studies, 6-7
 relation to the state, 9
 forms of, 30-34
 territorial distribution of powers, 39-41
 federal and unitary, 41-44
 functional division of powers, 44-46
 structure as influenced by distribution of powers, 48
 the legislature, 48-50
 the executive, 50-52
 administration, 52-54
 judiciary, 54-56
 the electorate, 56-60
 extension of functions in United States, 557-559
 Governor, in American colonies, 73-75
 in Revolutionary state governments, 89
 in the present states, 735-751
 election, 736
 qualifications, 736
 term, 736
 removal, 736-737
 succession, 737
 veto, 738-742

Governor, messages, 742-743
 budget-making, 743
 leadership, 744-745
 executive powers, 745-749
 appointing power, 746-748
 directing power, 748
 removal power, 748-749
 miscellaneous powers, 749
 references on, 751
 Governor's council, colonial, 75
 in the states, 748
 "Grandfather clauses," 607-608
 Grants-in-aid, nature, 559
 various forms, 560-564
 arguments for and against, 564-568
 Greenback party, 627
 Guam, government of, 591-592

H

Habeas corpus, suspension of, 471
 Hamilton, Alexander, in constitutional convention, 104
 contributes to *The Federalist*, 114-115
 on appointing power, 237
 on veto power, 262
 Hare system, proportional representation, 687-688
 Hawaii, government of, 578-579
 Health department, in cities, 946-949
 History, relation to political science, 7
 Home rule, for counties, 882-883
 for cities, 904-905
 House of Representatives (national), possible election of president, 229
 by whom elected, 349
 apportionment of members, 350-352
 growth of membership, 350-351
 general ticket and district systems, 352-353
 gerrymandered districts, 353-354
 contested elections, 355
 shortness of term, 355-357
 qualifications of members, 357-359
 compensation of members, 368
 privileges of members, 368-369
 process of organization, 372-373
 officers, 373-374
 rules, 375-376
 speakership, 376-381
 committees, 381-386
 caucus, 386-390
 steering committee, 388
 floor leaders, 388-389
 necessity of leadership, 390-391

House of Representatives (national),
introduction of measures, 397-398
multiplicity of bills, 398-399
committee work, 399-402, 404-405
calendars, 402-403
order of business, 403-405
three readings, 405-406
closure, 406-407
methods of voting, 407
compared with Senate, 422-424

I

Illinois Cities and Villages Act, 902
Immigration, laws concerning, 528-532
Impeachment, of judges, 453-454
general constitutional provision, 457-458
procedure, 458-459
in the states, 736-737, 857
Implied powers, nature of question, 128-129
practical necessity of, 129-130
Chief Justice Marshall on, 130
Income taxes, declared unconstitutional, 181, 476
authorized by Sixteenth Amendment, 181, 476
Indictments, 811
Individualism, attitude toward the state, 18-20
Informations, 811
Initiative, for constitutional amendments, 660-662
for statutes, 705-706
Injunctions, 415 n
Interior, Department of, established, 328-329
organization, 329
functions, 329-330
public land administration, 330-332
miscellaneous bureaus, 332-333
Intermediate credit banks, 517
Intermediate courts, in states, 809
Internal revenue, 480-482, 485-486
Interstate Commerce Act, 535-537
Interstate Commerce Commission, 537-541
Interstate relations, 144-145
Interstate compacts, 144

J

Jackson, Andrew, and the spoils system, 286-287
Jay, John, contributes to *The Federalist*, 115

Jeffersonian Republican party, 619-621
Judges. *See* Judiciary
Judicial councils, 817-818
Judicial review, colonial beginnings, 90-91
development under constitution, 132-133
exercised by Supreme Court, 442-449
opposition to, 446-447
in the states, 824-826
Judiciary, functions, 54-55
structure, 55-56
independence, 56
in American colonies, 77-78
in Revolutionary state governments, 90-91
Judiciary (national), reasons for creation, 425-427
scope of power, 427-428
jurisdiction, 428-430
how cases are brought, 430-431
criminal jurisdiction, 431-433
civil jurisdiction, 433-434
equity cases, 434-435
admiralty cases, 435
district courts, 435-437
circuit courts of appeal, 437
unified administration of courts, 437-438
composition and character of Supreme Court, 438-440
Supreme Court and review of legislation, 442-449
other national courts, 449-451
district attorneys and marshals, 451
relation to other branches of the government, 452-454
Judiciary (state), under Revolutionary constitutions, 90
functions, 804
justices of the peace, 805-807
county court, 807-808
supreme courts, 808-809
intermediate courts, 809
court reports, 808 n
court officials, 810
jury system, 810-811
grand jury, 811-812
defects, 812-827
administrative work, 814 n
court organization, 815-819
unification of, 817-818
veto power, 825-826
references on, 828-829
Jury system, 810-811
Jus sanguinis, 158-159
Jus soli, 158-159

Justice, Department of, growth, 320
 officers in Washington, 320
 field force, 320-321
 functions, 321-322
 Justices of the peace, 805-807

K

Know Nothing party, 624

L

Labor, Department of, established, 339
 organization, 340-341
 La Follette, Robert M., views on judicial review, 446
 organizes Progressive party in 1924, 633
 Lawrence, David, quoted, 744 n
 Legal tender cases, 519
 Legislative districts, 681-682
 Legislative reference libraries, 724
 Legislature, functions, 48-49
 structure, 49-50
 on American colonies, 75-77
 in Revolutionary state governments, 89-90
 Legislature (state), bicameral form, 673-679
 basis of representation, 681-683
 gerrymandering, 683
 discrimination against cities, 684-685
 personnel, 686
 proportional representation, 687-690
 functions, 692-693
 non-legislative functions, 693 n
 restrictions on, 695-706
 length of sessions, 702-703
 procedure, 701-702, 713-721
 committee system, 713-717
 conference committees, 716 n
 rules, 717-719
 congestion of measures, 719-720
 bill-drafting, 722-723
 content of legislation, 725
 relations with executive, 725-727
 multiplicity of bills, 729
 uniform state laws, 729-731
 lobby, 731-732
 special sessions, 742
 leadership in, 727-728, 744-745
 references on, 690, 711, 733-734
 Liberal Republican party, 627
 Lincoln, Abraham, use of war powers, 253-254
 Loans, methods of, 509-510, 801-802

Lobbying, in Congress, 421-422
 in state legislatures, 731-732
 Local government, relation to the state, 653, 862-864
 development of, 863-864
 the county, 864-879
 problems of county reorganization, 882-895
 the city and its charter, 897-908
 mayor-council city government, 911-921
 commission and manager government, 922-935
 municipal functions, 938-964
 townships, villages, special districts, 966-976
 Locke, John, quoted, 75
 Luce, Robert, quoted, 401

M

McBain, H. L., quoted, 134, 259
 McCulloch v. Maryland, 130, 146-147
 MacDonald, W., quoted, 820
 Madison, James, contributes to *The Federalist*, 114-115
 on nature of the constitution, 122
 Mandamus, 441 n
 Marbury v. Madison, 441
 Marshall, John, on implied powers, 130, 146-147
 Marshals, 451
 Maryland, budget system in, 797
 Massachusetts, legislative committees in, 713-714
 Mayflower Compact, 14
 Mayor, salary and term, 911
 powers and functions, 911-913
 in commission-governed cities, 927, 934
 Merchant marine, 527
 Merit system, in national administration, 288-294
 in the states, 769-772
 Messages, presidential, 260-262
 by the governor, 742-743
 Military and naval regulations, 471
 Minor political parties, 617, 623-628, 630-633
 "Model" state constitution, on amendments, 670 n
 on legislature, 677 n, 689 n, 728 n
 on executive, 745 n
 on judiciary, 818 n
 Montesquieu, on separation of powers, 44-45
 Morris, Robert, comments on the constitution, 116
 Munro, W. B., quoted, 358, 612-613
 Myers case, 240 242

N

- Nation, relation to state, 12
- National committee, of political parties, 634-636
- National convention system, 213-224
- National Guard, 471
- National Progressive party, 629
- National Republican party, 622-623
- Native American party, 624
- Naturalization, collective, 160-161
 - individual, 161-164
 - ineligibility to, 164-166
- Navy, Department of, organization, 318
 - the naval forces, 318-319
 - air forces, 319-320
- Negroes, enfranchisement of, 601
 - relation to suffrage in the South, 606-610, 846 n
- Newberry v. United States, 641
- New England, town government in, 966-968
- New Jersey plan, 107-108
- New York City, health department organization, 947-949
- Nicaragua, references on intervention in, 593 n
- Nineteenth Amendment, 185-186, 602
- Nomination, of president and vice-president, 211-224
 - of state and local officers, 834-839
- Non-partisan elections, 832-833, 837-838
- Non-Partisan League, 754 n
- Non-partisan organizations, 642
- Non-voting, extent, 610-611
 - causes, 611-612
 - remedies, 612-613
- Northwest Ordinance, government under, 571-573

O

- Oligarchy, as a form of government, 32
- Optional charters, in counties, 882
 - in cities, 906
- Ordinances, president's power to issue, 244-245
 - in cities, 915-917

P

- Panama Canal Zone, 591
- Parcel-post, 524
- Pardon, by president, 255-256
 - by governor, 749

- Parties, political, uses of, 615-617
 - two-party system, 617
 - minor parties, 617
 - periods in history, 618
 - Federalist, 618-621
 - Jeffersonian Republican, 616-621
 - personal politics, 622-623
 - National Republican, 622
 - Whig, 623-624
 - Anti-Mason, 623
 - Free Soil, 625
 - Native American, 625-626
 - Republican, 625-630
 - Union, 626
 - Prohibition, 626
 - Greenback, 627
 - Liberal Republican, 627
 - Democratic, 619-621, 628-630
 - National Progressive, 629
 - Peoples (Populist), 631
 - Socialist, 631-632
 - Farmer-Labor, 632
 - La Follette Progressive, 633
 - national organization, 634-637
 - campaign funds, 637-642
 - in the states, 830-832
 - non-partisan elections, 832-833
 - nominating methods, 834-839
 - legal status, 839-840
 - machinery, 840-841
 - "machines," 842-843
 - state activities, 842
 - finance, 843-844
 - references on, 860-861
- Patents, regulations concerning, 551-553
- Patent Office, 338
- Patronage, use of by president, 267
- Pendleton Act, 288
- Pension Office, 332
- Pensions, for government employees, 299
- Personnel problems, 297-301, 772
- Petition, right of, 168-169
- Philippines, citizenship in, 161
 - military government, 582-583
 - civil government, 583
 - organic laws of 1901 and 1916, 584
 - executive, 584-585
 - legislature, 585-586
 - council of state, 585-586
 - suffrage, 586-587
 - judiciary, 586-587
 - question of independence, 588-589
 - Thompson report, 589-590
- Platform, framed in national convention, 221
- Pluralism, 11-12

- Plural voting, 58
- Pocket veto, by president, 263
 - by governor, 738
- Police department, in cities, 938-941
- Police power, federal, 466
 - state, 693-694
- Political machines, 842-843
- Political science, relation to other social sciences, 6-7
- Polling officials, 848-849
- Population, essential element of a state, 10
- Populist party, 631
- Porto Rico, citizenship in, 161
 - government of, 579-582
- Postal power, 553-555
- Postal savings, 323-324
- Post-office, Department of, origins, 322
 - expansion of operations, 323
 - postal savings, 323-324
 - parcel post, 324
 - air mail service, 324-325
 - departmental organization, 325-326
 - problem of deficits, 326-327
 - functions regulated by Congress, 553-555
- President, nature of office decided upon, 198-199
 - term and re-eligibility, 199-200
 - proposal for a six-year term, 200-201
 - law of succession, 202
 - qualifications, 204
 - salary and allowances, 204
 - immunities, 204
 - relation with cabinet, 205-207
 - original mode of election, 208-209
 - changes introduced by Twelfth Amendment, 210-211
 - nomination by congressional caucus, 211-212
 - nomination by convention, 212-223
 - possible election by minority, 226
 - contested elections, 227-228
 - choice by House of Representatives, 230-231
 - sources of executive power, 235-236
 - power of appointment, 236-239
 - power of removal, 239-242
 - power of direction, 242-244
 - ordinance power, 244-245
 - power of recognition, 245-246
 - protection of citizens abroad, 246-247
 - treaty-making, 247-249
 - executive agreements, 249-250
- President, control over foreign policy, 250-251
 - war powers, 251-254
 - forcible execution of the laws, 254-255
 - pardon and reprieve, 255-256
 - development of legislative powers, 258-259
 - convenes Congress in special session, 259-260
 - messages, 260-262
 - veto power, 262-266
 - other modes of control over legislation, 267-268
 - as party leader, 268-270
 - control by Congress, 270
 - general growth of power, 270-271
 - opportunities for leadership, 271-272
 - examples of leadership, 272-273
 - qualities required, 273
 - problems of relations with Congress, 274
- Presidential primary, origins, 217-218
 - present status, 218-219
- Press, freedom of, 167-168
- Preventive justice, 827-828
- Primary, used in nominating senators, 365
 - See also* Direct Primary
- Private rights, guaranteed in written constitutions, 61-62
 - other guarantees, 62
 - classification, 63
 - in Revolutionary state constitutions, 88-89
 - enumerated in national constitution, 166-167
 - in relation to national government, 167-173
 - in relation to state government, 173-177
 - question of in territories, 575-576, 579-580
- Progressive party, 629, 633
- Prohibition party, 627
- Property rights, as against national government, 172-173
 - as against state governments, 174-175
- Proportional representation, 687-690, 856
- Prosecuting attorney, 875-877
- Protectorates, of United States, 593-594
- Psychology, relation to political science, 7-8
- Public defender, 876 n, 943 n
- Public lands, 330-332
- Public prosecutor, 875-877

Q

Quota system, for immigration, 529-531

R

Reapportionment of seats, in House of Representatives, 350-352
in state legislatures, 682-683

Recall, adoption in states, 857
merits and limitations, 858-860
in operation, 859

Reclamation service, 332

Recognition, presidential power of, 245-246

Reed, Thomas B., and rules of the House of Representatives, 379-380

Referendum, on constitutional amendments, 663-664, 669-670
adopted for statutes, 704-705
forms, 705-708
advantages and limitations, 706, 709-710

Registration of voters, 845-846

Religion, freedom of, 167

Removal, of officials by president, 239-240

Myers case, 240-242
protection against in executive civil service, 292-293
by governor, 748-749
by mayor, 912

Rendition, 152-154

Representation, as an element in government, 34-38

Representatives, House of, *See* House of Representatives

Reprieve, by the president, 255-256

Republican government, guaranteed to the states, 138-140

Republican party, origins, 625
supremacy, 626-627
divisions and reunions, 627-630

Republicanism, tested in America on large scale, 67-68

Revenue, *See* Finance

Revolution (American), nature of, 69-70, 84

antecedents, 83
state governments during, 86-91
Continental Congress, 91-93
Declaration of Independence, 93
Articles of Confederation adopted, 93-99

Rhode Island, constitutional conventions in, 665 n

River and harbor legislation, 534-535

Roosevelt, Theodore, seeks third term, 199-200

conception of president's powers, 235

Roosevelt, Theodore, executive agreement with Santo Domingo, 250
leadership, 272

Rules committee, in House of Representatives, 385-386

Rules, of House of Representatives, 375-376, 379-380, 385-386
of Senate, 395
of state legislatures, 717-718

S

Samoa, government of, 591-592

Sanitary districts, 973-974

Santo Domingo, executive agreement with, 250

School boards, in cities, 958-959

School districts, 973

Senate, passes resolution on third term for president, 200

rôle in connection with appointments, 237-238

rôle in connection with removals, 240

share in treaty-making, 248-249

federal basis, 359-360

state equality in, 360-362

original mode of election, 362-364

adoption of direct popular election, 364-365

effects of new electoral system, 365-366

term and continuity, 366-367

qualifications of members, 367-368

compensation of members, 368

privileges of members, 368-369

presiding officer, 392

caucuses and committee on rules, 393

committee system, 393-395

procedure compared with that of House of Representatives, 407-409

filibustering, 409-411

closure, 411-413

compared with House of Representatives, 422-424

Seventeenth Amendment, 184-185, 365-366

Sheppard-Towner Act, 563-564

Sheriff, 873-875, 886

Sherman Anti-Trust Act, 541-542

Sixteenth Amendment, 184, 476

Slave trade, constitutional provision on, 111

Social contract, theory of, 13-15

Socialism, attitude toward the state, 21-22

Socialist party, 631-632

- Social welfare activities, in cities, 956-957
 - Sociology, relation to political science, 6
 - Sovereignty, essential element of a state, 11
 - pluralistic views, 11-12
 - of states under Continental Congress, 91-94
 - of states under Articles of Confederation, 94-96
 - question of under constitution, 120-125
 - Speaker, of House of Representatives, election, 373
 - miscellaneous powers, 376-377
 - compared with English speaker, 377-378
 - prerogatives, 378-381
 - Speech, freedom of, 167-168
 - Special municipal corporations, 972-976
 - Spoils system in United States, 286-288
 - State, various uses of term, 9
 - definitions, 9
 - essential elements, 10-12
 - pluralist conceptions, 11-12
 - relation to nation, 12
 - theories of origins, 13-17
 - functions, 17-23
 - State central committees, 840
 - State, Department of, established, 303-304
 - functions, 304-305
 - organization, 305-306
 - foreign service, 307
 - State police, 754
 - States, government during Revolution, 89-90
 - sovereignty during Revolution, 91-92
 - status under Articles of Confederation, 93-94, 99
 - perpetuated under constitution, 119-120
 - question of sovereignty, 120
 - importance, 136, 644-649
 - equality in law, 137-138
 - obligations of national government toward, 138-140
 - admission to Union, 140-143
 - constitutional limitations on, 143-154
 - disputes, 154
 - citizenship in relation to, 157-158
 - relation to amending the national constitution, 180-182
 - common features, 649-653
 - constitutions of, 655-671
 - government of, 673 ff
 - State tax commissions, 786
 - Statute, as means of constitutional development, 189-190
 - Steering committee, in House of Representatives, 388
 - Streets, construction and upkeep, 954-955
 - Suffrage, qualifications, 57-58
 - in American colonies, 76-77
 - in Philippines, 586
 - constitutional basis, 598-599
 - a privilege rather than a right, 599-600
 - prior to 1815, 600
 - changes between 1815 and 1860, 600-601
 - enfranchisement of negroes, 601
 - enfranchisement of women, 601-604
 - present qualifications, 604-606, 844-845
 - restrictions on exercise by southern negroes, 606-610
 - non-voting, 610-613
 - Supreme Court, composition and character, 438-440
 - sessions, 440
 - decisions and opinions, 440-441
 - jurisdiction, 441
 - review of legislation, 442-445
 - relation to political controversies, 446-449
- T
- Taft, William H., conception of president's powers, 235-236
 - interest in executive reorganization, 342
 - Tariff, legislation on, 489-491
 - commission, 491-494
 - Tariff Commission, creation, 491-492
 - powers and duties, 492-493
 - criticism of, 494-495
 - Taxation (national),
 - constitutional provision on, 474-475
 - restrictions, 475-478
 - scope of power, 478-480
 - by both Congress and the states, 483-484
 - tariff legislation, 489-491
 - Tariff Commission, 491-495
 - Taxation (state), restrictions on, 145-147
 - forms employed, 777-779
 - general property tax, 778-787
 - collection, 787-788
 - Tenure of Office Act, 240
 - Territory, essential element of a state, 10
 - dependent, origin of, 571-572

Territory, Northwest Ordinance, 572-573
 power to acquire and govern, 573-575
 insular decisions, 575-576
 government of Alaska, 576-578
 government of Hawaii, 578-579
 government of Porto Rico, 579-582
 government of Philippines, 582-590
 government of Virgin Islands, 591
 government of Panama Canal Zone, 591
 government of Samoa and Guam, 591-592
 protectorates, 593-594
 Texas, white primary law, 608-609
 Thirteenth Amendment, 184
 Thompson, Carmi A., report on Philip-pines, 589-590
 Three-fifths clause, 110-111
 Tonnage duties, 525-526
 Town, in New England colonies, 78
 Town-meeting, in New England, 966-968
 Township, forms, 968
 government of, 969-970
 Treason, defined in national constitu-tion, 170
 Treasurer, state, 750, 789
 Treasury, of United States, 486-488
 Treasury, Department of, established, 312
 organization, 312-313
 financial functions, 313
 non-financial functions, 315
 organization of, 486-488
 Treaties, presidential initiative, 247
 Senate's connection with, 248-249
 abrogation, 249
 Trusts, laws regulating, 541-548
 Twelfth Amendment, 183, 210-211
 "Two-thirds" rule, in Democratic na-tional convention, 222-223

U

Unicameral legislatures, movement for, 679-680
 Uniform state laws, 729-731
 Union party, 626
 "Unit" rule, in Democratic national convention, 222-223
 Usage, as a mode of constitutional development, 193-195

V

Veto, power exercised by president, 262-263
 forms, 263-264
 frequency, 264
 workings, 264-266
 threats of, 267
 exercised by governors, 738-742
 Vice-president, nature of office, 201
 share of work of government, 201-202
 attendance at cabinet meetings, 202
 election of, 208-211
 nomination of, 223
 as presiding officer in Senate, 392-393
 Villages, government of, 971-972
 Virginia plan, presented at Philadel-phia convention, 106-107
 proposes a council of revision, 132
 Virgin Islands, government of, 591
 Voting machines, 851 n

W

War, relation of president to, 251-253
 how declared, 252
 declaration of, 468-469
 War, Department of, organization, 315-316
 the armed forces, 316-317
 public works and insular affairs, 317-318
 Washington, George, in constitutional convention, 104-105
 refuses third term, 199
 Waste, collection and disposal in cities, 953-954
 Water supply, in cities, 951-952
 Webb-Pomerene Act, 546-547
 Webster, Daniel, expounds nationalist doctrine, 121
 Weights and measures, control of, 550
 Welfare activities, in cities, 956-957
 Whig party, 623-624
 Wilson, Woodrow, use of war powers, 254
 revives use of oral messages, 261
 leadership, 272
 on character of Senate, 361-362
 on filibustering, 410-411
 on the governor's function, 744 n
 Women, given the suffrage, 601-602
 results of enfranchisement, 603-604

President and Vice Pres. die before
they appoint cabinet

Sec't of State & Foreign Affairs

158

Intro. to American government.

JK
421
.052
1928

1814

DATE _____

ISSUED TO

~~Shelved in Basement~~

16022

JK
421
.052
1928

